Supreme Court, U.S.
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No. 99-__

IN THE

Supreme Court of the United States

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should resolve the conflict between the Tennessee Supreme Court—which held in this case that a general choice-of-law provision in a contract subject to the Federal Arbitration Act has the effect of incorporating state law displacing that Act's directive that arbitration provisions are enforceable—and this Court, the federal circuit in which Tennessee is located, and other federal courts of appeal and state high courts, which have held that such a choice-of-law provision does not have that effect.

RULE 29.6 STATEMENT

The caption contains the names of all the parties that appeared in the Tennessee Supreme Court. Frizzell Construction Company, Inc. ("Frizzell") is a Tennessee corporation. There is no parent corporation or publicly held company owning 10% or more of Frizzell's stock.

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Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frizzell Construction Company, Inc. ("Frizzell") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is not yet reported and is reproduced in the appendix hereto ("App.") at 1a. The opinion of the Court of Appeals of Tennessee is unreported and reproduced at *id.* 12a. The rulings of the Chancery Court for Sevier County, Tennessee are unreported and reproduced at *id.* 22a, 28a.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on November 15, 1999. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, § 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

This case presents an important question concerning the interplay between federal and state law in an area—the enforcement of contracts subject to the FAA—in which this Court has frequently been called upon to provide guidance due to the vital national

interests at stake and countless number of transactions and parties affected.

The FAA establishes a national policy promoting arbitration of all claims or disputes arising under contracts involving interstate commerce, and a federal guarantee that agreements to arbitrate claims arising out of such contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The effect of the Act is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within [its] coverage." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As this Court held in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 400 (1967) (quotation omitted), one of the "national substantive law" rules embodied in the FAA is that "a claim of fraud of inducement of [a] contract * * * is for the arbitrators and not for the courts," and that this rule "governs even in the face of a contrary state rule."

Accordingly, "if contracting parties agree to *include* claims for [fraudulent inducement] within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (emphasis in original). In *Mastrobuono*, this Court further held that inclusion of a generic choice-of-law provision in a contract governed by the FAA does not, without more, evince an intent on the part of the parties to incorporate state law that conflicts with federal arbitration law. *Id.* at 63-64.

This case arises out of a clash between federal and state law over the arbitrability of claims of fraudulent inducement of a contract. The parties here entered into a standard form contract providing for the arbitration of "[a]ll claims, disputes and or other matters" arising out the contract. App. 2a. The Tennessee Supreme Court, however, held that the contract's general choice-of-law provision incorporated state law *precluding* arbitration of fraudulent inducement claims, even though it acknowledged that such claims are "certainly arbitrable under the FAA." App. 8a n.11. That decision directly conflicts with this Court's decision in *Mastrobuono*, recent precedent of the federal circuit in which Tennessee is located, and the decisions of other federal courts of appeal and state high courts.

When it enacted the FAA, Congress did not intend "state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). That is precisely what has happened here. The conflict created by the decision in this case on the important question presented is direct and extensive, and defeats the very uniformity of results that the FAA was enacted to secure. This Court should grant certiorari and resolve that conflict here.

STATEMENT OF THE CASE

Petitioner Frizzell is in the construction business. In April 1995, Frizzell agreed to oversee the construction of a hotel for respondent Gatlinburg L.L.C. ("Gatlinburg") in Gatlinburg, Tennessee. The parties used a standard Associated General Contractors Construction

Manager contract entitled "Standard Form of Agreement Between Owner and Construction Manager." The contract contained a choice-of-law clause (Art. 14.2) providing: "This Agreement shall be governed by the law of the place where the Project is located"—*i.e.*, Tennessee. App. 2a & n.1. It also contained an arbitration clause (Art. 16.1) providing: "All claims, disputes and or other matters in questions arising out of, or relating to, this Agreement or the breach thereof * * * shall be decided by arbitration." *Id.* 2a, 15a.

Shortly after the project was completed, a dispute arose between the parties over payments allegedly due under the contract. In August 1997, Frizzell filed an action in the Chancery Court of Sevier County, Tennessee, to perfect a contractor's lien on the property. Frizzell then submitted a demand with the American Arbitration Association to arbitrate all disputes arising under the contract, and moved the Chancery Court to stay the proceedings pending arbitration. Gatlinburg opposed Frizzell's arbitration demand and filed a counterclaim alleging that Frizzell had fraudulently induced it to enter into the contract. *Id.* 2a. In February 1998, the Chancery Court granted Frizzell's request for a stay and submitted its claim for payments under the contract to arbitration, but enjoined arbitration of Gatlinburg's fraudulent inducement claim. *Id.* 2a-3a, 30a.

Frizzell moved for reconsideration, explaining that because the contract involved interstate commerce, it was covered by the FAA, and under the FAA (not to mention the terms of the agreement itself) *all* claims arising under or related to the contract—including fraudulent inducement claims—were arbitrable. The

Chancery Court disagreed, holding that the contract did not involve interstate commerce "so as to bring the contract under the FAA," and, in any event, did not require arbitration of Gatlinburg's fraudulent inducement claim. *Id.* 3a. With respect to the latter issue, the court held that Tennessee law does not permit arbitration of fraudulent inducement claims, *see City of Blaine* v. *John Coleman Hayes & Assocs., Inc.* 818 S.W.2d 33 (Tenn. Ct. App. 1991),[1] and that Tennessee law—not the FAA—controlled here. App. 3a, 24a-25a.

The Court of Appeals of Tennessee affirmed. It agreed with the Chancery Court that under state law and, in particular, the *Blaine* case, "the issue of fraud in the inducement [w]as a question to be determined by the court," not an arbitrator. *Id.* 20a. The Court of Appeals did not reach the question whether the contract was covered by the FAA, because—according to the reasoning of *Blaine*—"unless and until it is established that there is a contract in existence, a consideration of whether the contract is controlled by or subject to the [FAA] is premature." *Id.* 19a.

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[1] In *Blaine*, the Tennessee Court of Appeals held that the Tennessee Arbitration Act "entitle[s]" parties "to a judicial determination on the issue" of fraud in the inducement of a contract. 818 S.W.2d at 38. In so holding, the Tennessee court "disagree[d] with the conclusion reached" by this Court in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing. Co., supra—i.e.*, that unless the contract provides otherwise, "a claim of fraud of inducement of [a] contract * * * is for the arbitrators and not for the courts," 388 U.S. at 400—and expressly "conform[ed]" its decision "to the dissent in *Prima [Paint]*." 818 S.W.2d at 37-38.

Frizzell filed an application for discretionary review to the Supreme Court of Tennessee, presenting both the issue whether the contract involved interstate commerce—so as to implicate the FAA—and, if so, whether the Chancery Court improperly barred arbitration of the fraudulent inducement claim. The Tennessee Supreme Court held that "this case plainly involves interstate commerce"—thus triggering the FAA—but that "in accordance with the [FAA], the chancery court properly retained jurisdiction over the claim of fraudulent inducement to enter a contract." *Id.* 1a.

The Tennessee Supreme Court recognized that the contract expressly provides for the arbitration of "'[a]ll claims, disputes and or other matters in questions arising out of, or relating to, this Agreement.'" *Id.* 2a (quoting Article 16.1). But it held that—*solely as a result of the separate choice-of-law provision*—the arbitration clause "is limited and subject to the additional qualification that Tennessee law provides the basis for deciding questions concerning [what claims are subject to arbitration]." *Id.* 10a. Thus, because Tennessee law does not allow the arbitration of fraudulent inducement claims, the Tennessee Supreme Court held that the Chancery Court properly refused arbitration of that claim here—notwithstanding that such claims are "certainly arbitrable under the FAA." *Id.* 8a n.11.

The Tennessee Supreme Court believed this holding was "consistent with the policies underlying the FAA." *Id.* 11a. But the court refused to address Frizzell's contention that this result contravenes the terms of the parties' express agreement to arbitrate "all claims" arising out of their standard form contract, and directly

conflicts with the result reached in numerous decisions construing the virtually identical provisions of other contracts governed by the FAA, including *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, *supra*, and *Ferro Corp.* v. *Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998). *See* Appellant's Br. in Tenn. S. Ct., at 19-34.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE HIGH COURT DECISION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS AND IS "UNTENABLE" UNDER *MASTROBUONO*.

1. The question presented in this case is framed by this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, *supra*. There, the Court considered whether a claim for fraudulent inducement of a contract governed by the FAA is subject to arbitration when the contract—like the one at issue here—broadly provides for the arbitration of all claims "arising out of or relating to" that contract. 388 U.S. at 398. In answering that question, this Court squarely held that—in the absence of evidence that the contracting parties intended otherwise—such a claim is for the arbitrator. *Id.* at 402-404. Thus, *Prima Paint* establishes as a matter of substantive federal law that "a broad arbitration clause *will be held* to encompass arbitration of the claim that the contract itself was induced by fraud," "even in the face of a contrary state rule." *Id.* at 400, 402 (emphasis added).[2]

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[2] The clear import of *Prima Paint* has not been lost on the lower courts. *See, e.g., Campaniello Imports, Ltd.* v. *Saporiti Italia S.p.A.*, 117 F.3d 655, 666 (2d Cir. 1997) (under FAA a court

The arbitration clause in *Prima Paint* was "*easily* broad enough" to require arbitration of the fraudulent inducement claim in that case, and the same goes for the virtually identical contractual language in the arbitration clause in this case. *Id.* at 406 (emphasis added). *Compare id.* (contract requires arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof") *with* App. 2a (contract requires arbitration of "[a]ll claims, disputes and or other matters in questions arising out of, or relating to, this Agreement or the breach thereof").

2. The Tennessee Supreme Court attempted to sidestep *Prima Paint* by pointing to the choice-of-law provision in the contract—and that provision alone—as evidence that the parties did not intend to arbitrate contract formation issues. *Id.* at. 8a n.11. But in doing so, the court directly contravened this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, *supra*. There, this Court held—as a matter of federal arbitration law—that the inclusion of a generic choice-of-law provision establishing that the contract is governed by the law of a particular state is *not* "evidence" that the parties intended to incorporate state law that

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may not adjudicate claims of fraud in the inducement of a contract generally); *R.M. Perez & Assocs., Inc.* v. *Welch*, 960 F.2d 534, 538 (5th Cir. 1992) ("If the fraud relates to the entire agreement, then the [FAA] requires that the fraud claim be decided by an arbitrator."); *Arnold* v. *Arnold Corp.*, 920 F.2d 1269, 1278 (6th Cir. 1990) (same); *Lee* v. *Heftel*, 911 P.2d 721, 724 (Haw. 1996) (under FAA, "broad arbitration clause will be held to encompass arbitration of the claim that contract itself was induced by fraud"); *Jones* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 604 So.2d 332, 336-337 (Ala. 1991) (same).

conflicts with federal arbitration law. *See* 514 U.S. at 63-64.

In *Mastrobuono*, the Court considered whether a choice-of-law provision in a standard form contract providing that it "shall be governed by the laws of the State of New York" incorporated New York law precluding arbitration of punitive damages claims. *Id.* at 53. In determining that the answer was "no," the Court flatly rejected respondents' argument that the "choice-of-law provision in [the] contract evidence[d] the parties' express agreement that punitive damages should not be awarded in the arbitration of any dispute arising under [the] contract." *Id.* at 56.

The Court reasoned that the choice-of-law provision could "reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." *Id.* at 59. Because it could be read as such, "[i]t [was] *not*, in itself, an unequivocal exclusion of punitive damages claims." *Id.* at 60 (emphasis added). At most, "the choice-of-law clause introduce[d] an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards," in accordance with federal law. *Id.* at 62. And "when a court interprets such provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved *in favor of arbitration.*'" *Id.* (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (emphasis added)). *See also Moses H. Cone*, 460 U.S. at 24-25 ("The Arbitration Act establishes that,

as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *whether the problem at hand is the construction of the contract language itself* or an allegation or waiver, delay, or a like defense to arbitrability.") (emphasis added).

Accordingly, the *Mastrobuono* Court held:

> [T]he best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, *but not to include special rules limiting the authority of arbitrators*. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. *This interpretation is untenable*. [514 U.S. at 63-64 (emphases added).]

The Tennessee Supreme Court decision in this case flouts the rule of *Mastrobuono*—on which petitioner specifically relied before the state high court in arguing that respondent's fraudulent inducement claim was subject to arbitration under the "national substantive law" recognized in *Prima Paint*, 388 U.S. at 400, and the parties' agreement to arbitrate "all claims" arising under their contract. *See supra* at 5. The standard choice-of-law and arbitration clauses contained in the contract involved in this case are identical for all practical purposes to the ones contained in the contract in

Mastrobuono.[3] Thus, the state high court's conclusion that the choice-of-law provision here incorporated state arbitration law that conflicts with federal arbitration law is just as "untenable" as the conclusion rejected by the Court in *Mastrobuono*. 514 U.S. at 64.

The Tennessee Supreme Court, however, turned a deaf ear to petitioner's arguments, reached a result contrary to *Mastrobuono*—allowing state arbitration law to displace federal arbitration law—and, thus, directly impeded the central aim of the FAA. State legislatures are not free to enact laws that require parties to accept rules or results that conflict with the FAA. *See Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). And state courts may not "construe [an] agreement" subject to the FAA in a manner that "would enable the court to effect what * * * the state legislature cannot." *See Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). Thus, as the Court put it in *Mastrobuono*, 514 U.S. at 58, "if contracting parties agree to include [particular claims] within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."

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[3] Compare App. 2a & n.1, 15a ("This Agreement *shall be governed by the law of [Tennessee]*," and "[a]ll claims, disputes, and or other matters in question *arising out of, or relating to*, this Agreement or the breach thereof * * * shall be decided by arbitration") *with* 514 U.S. at 58 n.2 ("This agreement * * * *shall be governed by the laws of the State of New York*," and "any controversy *arising out of or relating to* * * * this agreement or the breach thereof * * * shall be settled by arbitration") (emphases added).

In short, the conflict between *Mastrobuono* and the Tennessee Supreme Court decision could scarcely be more clear, and it provides reason enough to grant certiorari. *See* S. Ct. Rule 10(c).

3. This Court's decision in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, *supra*, is not to the contrary. In *Volt*, the Court upheld a state court decision interpreting a choice-of-law provision as incorporating state procedural rules of arbitration where those rules were "manifestly designed to encourage resort to the arbitral process," and "generally *foster[ed]* the federal policy favoring arbitration." 489 U.S. at 476 & n.5 (emphasis added). By contrast, the state law involved in this case—*precluding* arbitration of fraudulent inducement claims—*frustrates* the federal policy favoring arbitration of such claims. More to the point, as this Court observed in *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. at 688, "[t]he state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." Here—as in *Mastrobuono*—the state arbitration law at issue directly impinges on the enforceability of the arbitration agreement in a manner that conflicts with the FAA. In any event, any perceived inconsistency between *Mastrobuono* and *Volt* only underscores the need for review here. *See infra* at 21-23.

4. Finally, the Tennessee Supreme Court decision is also in serious tension with decisions of this Court holding that the FAA preempts conflicting state law restricting the arbitrability of claims. In *Doctor's Associates*, 517 U.S. at 686-688, for instance, the Court

held that a state law requiring notice of an arbitration clause to appear on the first page of a contract conflicted with the FAA and was therefore preempted by the FAA. Similarly, in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. at 273-281, the Court concluded that the FAA preempted a state statute rendering arbitration agreements unenforceable. And in *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-16 (1984), and *Perry* v. *Thomas*, 482 U.S. at 489-491, the Court held that the FAA preempted two California statutes that purported to require judicial resolution of certain disputes. In supplanting the FAA with state law precluding arbitration of fraudulent inducement claims, the Tennessee high court ran afoul of these decisions, too.

II. THE TENNESSEE HIGH COURT DECISION DIRECTLY CONFLICTS A DECISION OF THE FEDERAL CIRCUIT IN WHICH TENNESSEE IS LOCATED, AS WELL AS THE DECISIONS OF OTHER FEDERAL CIRCUITS AND STATE HIGH COURTS.

1. The conflict created by this case is by no means limited to this Court's decisions. As we explain next, the Tennessee Supreme Court decision also conflicts with the decisions of the federal courts of appeal and those of other state high courts, providing additional grounds for certiorari. *See* S. Ct. Rule 10(b).

Most significantly, Tennessee Supreme Court decision cannot be reconciled with the precedent of the Sixth Circuit—the federal circuit in which Tennessee is located. In *Ferro Corp.* v. *Garrison Industries, Inc.*, *supra*, the Sixth Circuit considered the very same issue

presented here—whether the inclusion of a choice-of-law provision in a contract governed by the FAA incorporated state law requiring judicial resolution of a fraudulent inducement claim. In reaching a result contrary to that of the Tennessee Supreme Court in this case, the Sixth Circuit first recognized that under *Prima Paint* "the issue of fraudulent inducement of a contract is to be decided by an arbitrator," unless the parties contract otherwise. 142 F.2d at 933. The court of appeals then rejected the district court's conclusion—the same one reached by the Tennessee Supreme Court here—that "by inserting [a standard] choice-of-law clause into their arbitration agreement, the parties expressly contracted to be bound by Ohio law, thus precluding application of the FAA." *Id.*

Expressly invoking the rule of *Mastrobuono*, the Sixth Circuit explained:

> [T]he Court finds no indication that the parties intended to incorporate Ohio law to determine that the issue of fraudulent inducement should be adjudicated in a judicial forum. As in *Mastrobuono*, the arbitration clause is conspicuously broad, as it applies to "[a]ll controversies and claims arising out of or relating to this Agreement * * *." Given this broad language, the Court does not believe that the parties intended to incorporate Ohio law, or invoke the power of courts, to determine the scope of the arbitration agreement. Thus, we harmonize the provisions of the [agreement] in the same manner as the Court did in *Mastrobuono*: by ruling that the choice-of-law clause [was] not an 'unequivocal inclusion' of [state] law which arguably holds that the issue of

> fraudulent inducement is one for a court, and not an arbitrator, to decide. [*Id.* at 937.]

In so holding, the Sixth Circuit recognized that "[t]his decision not only finds resonance in the decisional law of other circuits, but also in policy and common sense." *Id.* at 937-938 (citing cases). Moreover, the court expressly rejected the contention that this Court's decision in *Volt* required a different result. As the Sixth Circuit explained, *Volt* "did not present a situation in which state and federal law were in conflict," since the FAA does not address the issue dealt with by the state procedural rule of arbitration involved in that case—whether a court may stay arbitration pending resolution of related litigation involving third parties not subject to arbitration. *Id.* at 934. By contrast, in the situation presented in *Ferro*—as here—state and federal law clearly conflict: fraudulent inducement claims are plainly arbitrable under federal law, *see Prima Paint*, 388 U.S. at 402, but not under state law. Yet the Tennessee Supreme Court refused to even address *Ferro*, notwithstanding petitioner's specific reliance on it.

The direct and irreconcilable conflict between the Sixth Circuit and the Tennessee Supreme Court on the precise question presented by this case is especially troubling, given that Tennessee is located within the Sixth Circuit. On the same standard form contract, a fraudulent inducement claim in Tennessee will *not* be subject to arbitration if the contract is interpreted by a state court, but *will* be subject to arbitration if it is interpreted by a federal court. This result offends notions of fairness, encourages forum-shopping, and

undermines federal policy. For these reasons, this Court has already lamented this very predicament:

> [I]t is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable. The [contrary] interpretation given * * * by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent * * * to create a right to enforce an arbitration contract and yet make that right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe that Congress intended to limit the [FAA] to disputes subject only to *federal* court jurisdiction. Such an interpretation would frustrate Congressional intent * * *. [*Southland Corp.* v. *Keating*, 465 U.S. at 15-16 (footnotes omitted) (emphasis in original).]

See also Allied-Bruce Terminix Cos. v. *Dobson*, 513 U.S. at 272 ("Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases."); *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (courts should strive for substantial uniformity and predictability of outcomes in federal and state court litigation). The Court should grant review to prevent such an intolerable outcome here.

2. As the Sixth Circuit highlighted in *Ferro*, *see* 142 F.2d at 937-938, the conflict of authority implicated by this case extends to the decisions of other federal courts of appeals decisions as well. In the wake of *Mastro-*

buono, numerous courts of appeal have followed that decision and held that a general choice-of-law provision does not evince an intent to incorporate state law that precludes arbitration of an issue or otherwise conflicts with the FAA. *See, e.g.*, *UHC Management Co.* v. *Computer Sciences Corp.*, 148 F.3d 992, 996-997 (8th Cir. 1998) (under *Mastrobuono*, choice-of-law provision did not evince an intent to have arbitration award reviewed under state law standards); *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998) ("*Mastrobuono* dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators"); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d 380, 382-383 (4th Cir. 1998) ("The Supreme Court has * * * squarely rejected the argument that a federal court should read a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law."); *National Union Fire Ins. Co. of Pittsburgh* v. *Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir. 1996) (*Mastrobuono* "squarely reject[s]" argument that choice-of-law clause incorporated state law requiring court to decide preclusion issue); *PaineWebber, Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) ("Following the principles and analysis set forth in *Mastrobuono*, we * * * find that the choice-of-law clause in this case is not an expression of intent to adopt New York caselaw requiring [application of state rule that contravened federal arbitration law]").

3. The conflict also involves state court decisions. Unlike the Tennessee Supreme Court, other state high courts—heeding the rule of *Mastrobuono*—have held

that general choice-of-law provisions do not automatically incorporate state arbitration law that conflicts with the FAA.

In *L & L Kempwood Assocs., L.P.* v. *Omega Builders, Inc. (In re L & L Kempwood Assocs., L.P.)*, 1999 WL 1084240, at *2 & nn.16, 17 (Tex. Dec. 2, 1999), for example, the Texas Supreme Court held that a standard choice-of-law provision did not act to displace the FAA with conflicting state arbitration law requiring a court to determine the sufficiency of an arbitration demand. Expressly relying on *Mastrobuono*, *Ferro*, and other federal circuit decisions discussed above, the Texas high court reasoned that "[t]he choice-of-law provision did not specifically exclude the application of federal law, and absent such an exclusion we decline to read the choice-of-law clause as having such an effect." *Id.* at *2 (footnotes omitted). Ignoring *Mastrobuono* and *Ferro*, the Tennessee Supreme Court here held that an indistinguishable choice-of-law provision had the *opposite* effect.

Similarly, in *Homes of Legend, Inc.* v. *McCollough*, 2000 WL 92255, at *5 n.9 (Ala. Jan. 28, 2000), the Alabama Supreme Court—following *Mastrobuono*—concluded that a choice-of-law clause "provide[d] for the application of Alabama substantive law in determining the merits of the parties' disputes," whereas the arbitration provision set forth "the procedure to be used in resolving those disputes." In so holding, the court recognized that—under the rule of *Mastrobuono*—the fact that the agreement contained both a provision selecting Alabama law (which renders arbitration agreements unenforceable) and an arbitration provision

did not render it "internally inconsistent or ambiguous." The court also held, moreover, that interpreting the choice-of-law clause as incorporating state arbitration rules that displaced federal arbitration law would "conflict[] with the FAA." *Id.*[4]

The conflict between the Tennessee Supreme Court decision in this case and *Kamaya Co.* v. *American Property Consultants, Ltd.*, 959 P.2d 1140 (Wash. Ct. App. 1998), *rev. denied*, 978 P.2d 1099 (Wash. 1999), is even more acute. *Kayama* turned on precisely the same issue presented here and in *Ferro*. The plaintiffs did not dispute "that under the FAA, general arbitration clauses ordinarily cover claims of fraud-in-the-inducement of a contract," but they argued that the contract's standard choice-of-law provision had the effect of displacing the federal arbitration rule by providing that the contract was governed by Japanese law (which, according to the plaintiffs, does not require arbitration of such claims).

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[4] *See also, e.g., Levine* v. *Advest, Inc.*, 714 A.2d 649, 659-661 (Conn. 1998) (choice-of-law provision did not incorporate state law requiring court to decide issue of timeliness); *Osteen* v. *T.E. Cuttino Constr. Co.*, 434 S.E.2d 281, 283-284 (S.C. 1993) (choice-of-law provision did not incorporate state arbitration law, but rather only state substantive law to be applied by arbitrators in resolving conflicts under agreement); *Hunter, Keith Indus.* v. *Piper Capital Management Inc.*, 575 N.W.2d 850, 854 (Minn. Ct. App. 1998) ("As in *Mastrobuono*, we read the choice-of-law provision to govern the rights and duties of the parties, while the arbitration clause covers the arbitration.").

959 P.2d at 1145-46. The state court disagreed, recognizing that this Court "rejected a very similar argument in *Mastrobuono*," and that the Sixth Circuit in *Ferro* had done the same. *See id.* at 1146-47. Moreover, as the Washington court observed, the "strong federal policy favoring arbitration" also compelled this result. *Id.* at 1148. Nevertheless, under the Tennessee high court decision here the fraudulent inducement claim in *Kamaya* would have been subjected to adjudication rather than arbitration, thus frustrating the "strong federal policy favoring arbitration." *Id.*

4. Further heightening the need for review is the confusion that *Mastrobuono* has left in its wake concerning its application in state court. Because *Mastrobuono* reached this Court by way of federal courts sitting in diversity, some state courts have suggested that *Mastrobuono* is only binding upon federal courts interpreting contracts under diversity jurisdiction, and that state courts are accordingly free to ignore the rule of *Mastrobuono* even when interpreting the *same* provisions in contracts. *See, e.g., State Farm Mut. Ins. Co.* v. *George Hyman Constr. Co.*, 715 N.E.2d 749, 755 (Ill. App. Ct. 1999) (holding that a choice-of-law provision incorporated state arbitration law because court had authority to reach that conclusion under *Mastrobuono*); *Dean Witter Reynolds, Inc.* v. *Trimble*, 631 N.Y.S.2d 215, 217 n.4 (N.Y. Sup. Ct. 1995) (noting that "[e]ven if the instant case involved a standard-form contract with the identical New York choice-of-law clause [at issue in *Mastrobuono*]," the court "would not be bound to interpret it in the same way as the U.S. Supreme Court did * * * since the interpretation of contracts is a matter of state law."); *see also* Thomas A. Diamond, *Choice of*

Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling The Supreme Court Within Itself, 39 Ariz. L. Rev. 36, 60 (1997) (observing that "[s]tate courts have tended to give *Mastrobuono* a narrow reading").

While this is a minority view, it arguably finds support in footnote 4 of the *Mastrobuono* decision, where the Court distinguished *Volt* on the ground that it involved a state court's construction of a contract to which the Court was obliged to give deference, whereas *Mastrobuono* involved a federal court's interpretation of a contract which the Court reviewed *de novo*. *See* 514 U.S. at 60 n.4. As we have explained, *Volt* is distinguishable from *Mastrobuono* on other grounds—including the fact that incorporation of the state law rule in that case "foster[ed]" rather than frustrated federal arbitration law. *Volt*, 489 U.S. at 476 & n.5. In addition, whatever deference is owed state court constructions of contracts, such deference plainly does not require adoption of "untenable" constructions of such contracts. *Mastrobuono*, 514 U.S. at 64.

But in any event, the fact that some state courts—including the Tennessee Supreme Court in this case—have felt free to disregard *Mastrobuono* in construing contracts with virtually the same choice-of-law and arbitration provisions considered in *Mastrobuono* demonstrates the need for this Court's guidance. *See* Diamond, *supra*, at 65 ("The longer *Volt* and *Mastrobuono* remain unreconciled, the greater will be the confusion and disparity of opinion among the state and federal courts."); G. Richard Shell, *Federal Versus State Law in the Interpretation of Contracts Containing*

Arbitration Clauses: Reflections on Mastrobuono, 65 U. Cin. L. Rev. 43, 63 (1996) ("By refusing to question the underlying state-law bias of *Volt*, the Court in *Mastrobuono* missed a major opportunity to clarify the law, reduce uncertainty, and save arbitration users pointless litigation costs."). This case is an ideal vehicle through which to provide such guidance.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Although the multiple conflicts raised in this petition alone provide a compelling basis for review, certiorari is particularly appropriate given the importance and recurring nature of the question presented. *See, e.g., Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (granting certiorari to consider important arbitration issue); *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 525 (1979) (granting certiorari to consider "important and recurring" issues).

Enacted to "revers[e] centuries of judicial hostility to arbitration agreements," the FAA reflects a strong "federal policy favoring arbitration" of disputes. *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 225-226 (1987) (quotation omitted) (alteration in original). The reasons supporting this policy "are as wise as they are obvious: litigation is costly and time consuming, and * * * judges are less adapted to the nuances of the disputes that typically arise" in various contexts than persons chosen to arbitrate such disputes because of their expertise in a particular area. *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747 (1981) (Burger, C.J., and Rehnquist, J., dissenting). Submitting

disputes to such persons thus "provides a swift, fair, and inexpensive remedy." *Id.* at 748. By "rigorously enforc[ing] agreements to arbitrate," *Shearson/American Express,* 482 U.S. at 226, this Court has consistently endeavored to effectuate the federal policy favoring arbitration. That policy is directly threatened here.

As the Sixth Circuit recognized in *Ferro*, "[t]he policy of the FAA is to enforce privately entered agreements to arbitrate, and to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration consistent with the national policy favoring arbitration." 142 F.3d at 938. Accepting the interpretation offered and rejected in *Mastrobuono* and *Ferro*—but embraced by the Tennessee Supreme Court here—

> would vitiate the policy aims of the Act by enabling litigants to effectively abrogate the FAA's applicability to [contracts with choice-of-law provisions that incorporate the law of States which preclude arbitration of fraudulent inducement claims] by pleading fraudulent inducement. That is, a party would simply assert that the contract was fraudulently induced, thereby removing the case from the jurisdiction of the arbitrators, and vesting it with a court. Though the court's jurisdiction over the matter would terminate subsequent to it determining whether or not the contract was fraudulently induced, the litigation would vitiate the primary benefit of arbitration, *i.e.*, the expeditious, inexpensive resolution of disputes. [*Id.*]

That is precisely what has happened here. But the matter is even graver than that. As the Sixth Circuit continued: "Most contracts include a choice-of-law

clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation is simply not viable, as it would effectively emaciate the Act itself." *Id.* Nevertheless, that interpretation is now the law of Tennessee.

Finally, as is evident from the numerous conflicts engendered by the state high court decision, the basic question presented by this case is recurring. Arbitration clauses are a common feature of commercial contracts, *see, e.g., Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 411 n.11 (1988) (noting that arbitrators are designated by nearly all collective bargaining agreements as the adjudicators of contract disputes); *Bird* v. *Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 124 (2d Cir. 1990) (Kearse, J., dissenting) (noting "widespread use" of arbitration clauses in brokerage contracts), and such contracts invariably contain choice-of-law provisions. *See Ferro*, 142 F.3d at 938. The contract in this case, for instance, is a standard form contract used by a multitude of construction contractors—in Tennessee and elsewhere in the Nation. Numerous States have enacted arbitration statutes that expressly exclude certain types of disputes from arbitration, *see* 2 Gabriel M. Wilner, *Domke on Commercial Arbitration* App. I (Rev. ed. 1999), and still others—Tennessee and New York, for example—exclude certain claims from arbitration as a matter of judicial rule. Until resolved by this Court, the question presented by this case will accordingly continue to arise with great frequency.

This Court should grant certiorari to ensure uniformity of results and that the FAA's mandate requiring the enforcement of all arbitration agreements involving interstate commerce—including agreements to arbitrate fraudulent inducement claims—remains "the supreme Law of the Land." U.S. Const. art. VI. § 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Nov. 15, 1999]

IN THE SUPREME COURT OF TENNESSEE,
AT KNOXVILLE

FRIZZELL CONSTRUCTION COMPANY, INC.,

Plaintiff/Appellant,

v.

GATLINBURG, L.L.C.,

Defendant/Appellee.

No. E1998-00176-SC-R11-CV

Nov. 15, 1999

OPINION

WILLIAM M. BARKER, Justice.

In this appeal, we address two primary issues: (1) whether the contract in this case providing for construction of a hotel in Tennessee "involves" interstate commerce so as to implicate the Federal Arbitration Act, and (2) whether the chancery court erred in withholding contract formation issues from arbitration. We hold that the contract in this case plainly involves interstate commerce and that the parties did not intend to arbitrate a claim of fraudulent inducement to enter a contract. Therefore, in accordance with the Federal Arbitration Act, the chancery court properly retained jurisdiction over the claim of fraudulent inducement to enter a contract. The judgment of the Court of Appeals is affirmed.

BACKGROUND

On April 4, 1995, Gatlinburg, L.L.C. ("Gatlinburg"), entered into a contract with Frizzell Construction Company, Inc. ("Frizzell"), for the construction of a hotel in Sevier County, Tennessee. Gatlinburg owned the project, and Frizzell served as the management company in charge of constructing the hotel. The contract contained a provision stating that the laws of Tennessee would govern the contract and a provision requiring arbitration of "[a]ll claims, disputes and or other matters in questions arising out of, or relating to, this Agreement or the breach thereof . . . ."[1]

Shortly after the substantial completion of the hotel, a dispute arose between the parties relating to certain payments due to Frizzell under the contract. This dispute ultimately culminated in Frizzell filing a "Complaint to Enforce Mechanic's Lien and for Breach of Contract" in the Sevier County Chancery Court on August 22, 1997. On October 27, 1997, Gatlinburg filed its Answer, and in an amended counterclaim, Gatlinburg alleged that the contract was fraudulently induced through Frizzell's misrepresentation of its expertise and ability to complete the project for the stated amount. On November 3, 1997, Frizzell made a demand for arbitration, and eight days later, Frizzell filed a motion to stay the court proceedings pending arbitration.

The chancellor granted Frizzell's motion to stay and submitted the issues concerning overdue payment to

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[1] The choice-of-law provision in section 14.2 of the contract states that "[t]his agreement shall be governed by the law of the place where the Project is located." The parties agree that the clause contemplates application of Tennessee law.

arbitration. However, the court withheld from arbitration Gatlinburg's allegation of fraudulent inducement because Tennessee law does not permit arbitration of this claim. In a motion to reconsider, Frizzell argued that because the contract involves interstate commerce, the Federal Arbitration Act ("FAA") required submission of all disputes, including that of fraudulent inducement, to the arbitrator. The chancellor disagreed and held that the contract did not "involve interstate commerce so as to bring the contract under the FAA." The chancellor also held, without stating any reasons, that even if the contract did involve interstate commerce, the FAA was nevertheless inapplicable.

The Court of Appeals affirmed the decision of the trial court to withhold the issue of fraudulent inducement from arbitration. While the Court of Appeals did not decide whether the contract involves interstate commerce, the court held that because the parties had chosen Tennessee law to govern the contract, the issue of fraudulent inducement could not be submitted to the arbitrator. The Court of Appeals also held that any decision as to whether the contract was subject to the FAA was "premature" until a determination was made under Tennessee law that the contract was valid.[2]

We granted review to decide (1) whether this contract involves interstate commerce, and (2) whether the trial court erred in withholding the claim of fraudulent inducement from arbitration. We hold that this contract

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[2] The Court of Appeals reasoned that "[i]f [the contract] is rescinded, there is nothing to arbitrate. On the other hand, if the contract is found to be valid and binding, the disputes between the appellant and the appellee are subject to arbitration." *Frizzell Constr. Co.* v. *Gatlinburg, L.L.C.*, No. 03A01-9805-CH-00161, slip op. at 7 (Tenn. Ct. App. Nov. 2, 1998).

plainly involves interstate commerce and that the FAA does apply to enforce the agreement according to its terms. Because we find that the contract evidences the intent of the parties to judicially resolve a claim of fraudulent inducement, we also hold that the chancellor properly withheld this issue from arbitration.

ANALYSIS

The FAA ensures the enforcement of written agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . ." *See* 9 U.S.C. § 2 (1994). Therefore, we must first decide whether this contract is one "evidencing a transaction involving commerce" before we can decide the proper application of the FAA.

On their face, the words "evidencing" and "involving commerce" do not seem as broad as the phrase "affecting commerce," which is the language typically used by Congress to invoke the full range of its commerce power.[3] However, the United States Supreme Court has stated that "the word 'involving' is broad and is indeed the functional equivalent of 'affecting.'" *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 274 (1995). As such, the FAA "embodies Congress'[s] intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry* v. *Thomas*, 482 U.S. 483, 490 (1987). This interpretation is sup-

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[3] As the United States Supreme Court has stated, "Again, half a dozen enactments . . . are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect', 'interrupt', or 'promote' interstate commerce." *See Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944).

ported by the original report of the House of Representatives, which further indicates that the phrase "involving commerce" is not meant to restrict the reach or application of the FAA. The report states that "[t]he control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." H.R. Rep. No. 96, at 1 (1924), *quoted in Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n. 7 (emphasis added).

As part of its constitutional authority to regulate interstate commerce, Congress may regulate intrastate activities that have a substantial relation to interstate commerce. *See United States* v. *Lopez*, 514 U.S. 549, 557-59 (1995). After a careful review of the record, we find that such a relation is present in this case. At least six out-of-state contractors participated in the construction of the hotel, at least nine employees were employed from outside Tennessee, and at least seven out-of-state vendors supplied more than $380,000 worth of materials for the project.[4] An Ohio corporation insured the project,[5] and a Delaware corporation based in New Jersey issued a payment and performance bond along with a bond to discharge liens filed against the project as required by the contract.[6] The construction financing

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[4] *See Tennessee River Pulp & Paper Co.* v. *Eichleay Corp.*, 637 S.W.2d 853, 855 (Tenn. 1982) (finding interstate commerce present in part because the "materials used, the labor employed, and the subcontractors involved . . . came to the project from outside Tennessee").

[5] *See United States* v. *Dye Constr. Co.*, 510 F.2d 78, 83 (10th Cir. 1975) (finding interstate commerce in part when insurance was acquired from out-of-state sources).

[6] *See, e.g., American Home Assurance Co.* v. *Vecco Concrete Const. Co.*, 629 F.2d 961, 963 (4th Cir. 1980) (finding interstate

was accomplished with the assistance of three out-of-state banks,[7] and the purpose and scope of the agreement was to develop a commercial venture extending beyond Tennessee.[8] When all of these factors are viewed together, it is clear that this contract is one that "involves commerce."[9]

Because the contract in this case is one that involves interstate commerce, the FAA applies to ensure that the arbitration agreement between the parties is enforced according to its terms. Section two of the FAA states that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as

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commerce present in part because performance bonds were issued by out-of-state corporations); *Lost Creek Util.* v. *Travis Indus. Painters*, 827 S.W.2d 103, 105 (Tex.Ct.App. 1992) (finding interstate commerce in part because the performance bond was given by a surety company headquartered in another state).

[7] *See, e.g., Roberson* v. *The Money Tree of Alabama, Inc.*, 954 F.Supp. 1519, 1523 (M.D. Ala. 1997) (finding that a contract "involves commerce" in part because the financing was obtained from out-of-state banks).

[8] *See, e.g., Foster* v. *Turley*, 808 F.2d 38, 40-41 (10th Cir. 1986); *Fairchild & Co.* v. *Richmond, Fredericksburg & Potomac R.R. Co.*, 516 F.Supp. 1305, 1310-11 (D.D.C. 1981) (stating that the FAA applies when purpose and scope of agreement is to develop commercial venture extending beyond state line). In this case, the intent to develop a commercial venture extending beyond Tennessee is evidenced by efforts to market the hotel through a nationwide reservation system and by the fact that the completed hotel is a franchise of a national hotel chain.

[9] Gatlinburg argues primarily that this contract does not involve interstate commerce because the contract itself does not contemplate interstate activity. The test under the FAA, however, is whether interstate commerce is present in fact, not whether the parties contemplated that interstate activity would occur. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 281. Since interstate commerce is plainly present in fact, the appellee's argument is without merit.

exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. Although the provisions of the FAA are to be applied in both state and federal courts, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 684-85 (1996) (citing *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984)), the "FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 477 (1989).

The purpose of the FAA is "to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sciences, Inc.*, 489 U.S. at 476. However, parties cannot be forced to arbitrate claims that they did not agree to arbitrate. As the United States Supreme Court has stated,

> Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Info. Sciences, Inc., 489 U.S. at 479 (citations omitted).

The FAA's "proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono*, 514 U.S. at 57. Because "arbitration is a matter of contract[,] . . . a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986).

When parties agree to arbitration, the FAA ensures enforcement of that agreement by withdrawing "the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. However, consistent with the FAA, parties may agree that only certain issues will be submitted to arbitration or that they will not arbitrate at all. *Cf. Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Therefore, the question essentially becomes "what the contract has to say about the arbitrability of petitioner's claim . . . ." *Mastrobuono*, 514 U.S. at 58. If the parties in this case agreed to arbitrate the claim of fraudulent inducement, then despite such a prohibition under Tennessee law,[10] the claim must be submitted to arbitration. Conversely, if the parties did not agree to arbitrate the claim of fraudulent inducement, then they can not be compelled to arbitrate the claim despite its arbitrability under the FAA.[11]

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[10] In *City of Blaine* v. *John Coleman Hayes & Associates, Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991), the Court of Appeals held that the issue of fraudulent inducement could not be submitted to arbitration under the Tennessee Uniform Arbitration Act, Tenn. Code Ann. §§ 29-5-301 to -320 (Supp. 1990).

[11] Citing the Supreme Court's decision in *Prima Paint Corp.*, Frizzell argues that the FAA compels the conclusion that a claim of fraudulent inducement to enter a contract is to be resolved in arbitration. While a claim of fraud in the inducement of a contract is certainly arbitrable under the FAA, a more close reading of the opinion, however, shows that the issue arose because "there [was] no evidence that the contracting parties intended to withhold that issue from arbitration." 388 U.S. at 397. If evidence of such an intent had been presented in *Prima Paint Corp.*, then a different conclusion may have resulted. The FAA simply does not compel arbitration of any issue unless (1) an express agreement exists to

Courts should generally apply "ordinary state-law principles" in deciding whether the parties agreed to submit certain issues to arbitration. *See First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (citing *Mastrobuono*, 514 U.S. at 62-63). Under Tennessee law, the law governing this contract, the "cardinal rule [in interpreting contracts] . . . is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Bob Pearsall Motors, Inc.* v. *Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). Courts may determine the intention of the parties "by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms." *Penske Truck Leasing Co.* v. *Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990). No single clause in a contract is to be viewed in isolation; rather, the contract is to be "viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate another." *Cocke County Bd. of Highway Comm'rs* v. *Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985).

In this case, the arbitration clause purports to govern "[a]ll claims, disputes and other matters in questions arising out of, or relating to, this Agreement . . . ." Viewed in isolation, the breadth of this clause appears to evidence an intent to submit all issues to arbitration,

---

arbitrate a specific issue, or (2) doubt exists as to whether the parties intended to withhold a specific issue from arbitration. *See Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

including issues of contract formation. However, reading the contract as a whole, the arbitration clause--along with every clause in the contract--is limited and subject to the additional qualification that Tennessee law provides the basis for deciding questions concerning its scope and interpretation.

Although the appellant urges that the Tennessee choice-of-law clause is without effect upon the arbitration clause, we can find no support for this proposition in the contract itself. The choice-of-law clause plainly states that it governs the entire agreement, and no provision in the contract appears to be exempt from the effects of the choice-of-law clause. By stating that the contract is to be governed by Tennessee law, the parties have indicated their intention to arbitrate all disputes "arising out of, or relating to" their agreement—but only to the extent allowed by Tennessee law.[12] Interpreting each clause in light of the other, we read the arbitration clause to more accurately state, "In accordance with Tennessee law, all claims, disputes, and other matters in questions arising out of, or relating to, this Agreement . . . shall be decided by arbitration. . . ." Therefore, because Tennessee law contemplates judicial resolution of contract formation issues, we conclude that the parties have indicated their intention not to submit such issues to arbitration.

---

[12] The parties in this case were both relatively sophisticated business contractors, and presumably, they were well aware that Tennessee law does not allow arbitration of contract formation issues. As such, the parties could have drafted the arbitration clause with some ease to specifically include arbitration of contract formation issues. The failure to do so, coupled with the express adoption of Tennessee law to govern the contract, leads this Court to conclude that the parties did not intend for contract formation issues to be decided by the arbitrator.

The FAA requires the courts of this state to enforce arbitration agreements according to their terms. Because the parties in this case have agreed to arbitrate their disputes to the extent allowed by Tennessee law, we therefore hold that the chancery court properly submitted all issues relating to the merits of the contract to arbitration. We also hold that the chancery court properly withheld the issue of fraudulent inducement from arbitration in accordance with the intention of the parties.

As evidence that a choice-of-law clause can not modify an arbitration clause, the appellant quotes our statement in *Tennessee River Pulp & Paper Co.* v. *Eichleay Corp.*, 637 S.W.2d 853 (Tenn. 1982), that "parties should not be able to render [the FAA] inapplicable by providing for arbitration under the laws of a particular state." *See* 637 S.W.2d at 857. In *Tennessee River*, however, we did not specifically address the effects of a choice-of-law clause upon other contract provisions. We only held that the FAA rendered arbitration agreements fully enforceable according to their own terms, thereby modifying our common law. We did not hold that parties are incapable of choosing the law by which arbitration is to be conducted. Such a rule would be contrary to the declaration that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *See Mastrobuono*, 514 U.S. at 57.

Therefore, consistent with the policies underlying the FAA, our holding in this case simply reflects that parties may choose the arbitration law by which they intend to be governed. The enforcement of this agreement according to the intent of the parties is in full accord with

the FAA, even if the result is that the parties agree to submit some issues for judicial resolution that the FAA would otherwise permit arbitration to resolve. This Court "may give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *See Volt Info. Sciences, Inc.*, 489 U.S. at 479.

CONCLUSION

To summarize, we hold that the chancery court erred in finding that this contract is one not "evidencing a transaction involving commerce." We also hold that when viewed as a whole, the contract reveals the intention of the parties to arbitrate all disputes to the extent allowed by Tennessee law. Because the parties did not intend to arbitrate contract formation issues, the chancellor's decision not to submit the claim of fraudulent inducement to arbitration was consistent with the FAA. Therefore, we affirm the judgment of the Court of Appeals and remand the sole issue of fraudulent inducement to the chancery court for further proceedings consistent with this opinion.

Costs are assessed to the appellant, Frizzell Construction Company, Inc.

Panel: ANDERSON, C.J., DROWOTA, BIRCH, J.J., BYERS, S.J.

APPENDIX B

[Filed Nov. 2, 1998]

IN THE COURT OF APPEALS
AT KNOXVILLE

FRIZZELL CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v.

GATLINBURG, L.L.C.,

Defendant-Appellee.

C.A. NO. 03A01-9805-CH-00161

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Sevier County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court in reserving the issue of fraud in the inducement as a question to be determined by the court. Costs of this appeal are assessed to the appellant and this cause is remanded to the trial court for such other and further action as may be necessary.

PER CURIAM

[Filed Nov. 2, 1998]

IN THE COURT OF APPEALS
AT KNOXVILLE

FRIZZELL CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

v.

GATLINBURG, L.L.C.,

Defendant-Appellee.

C.A. NO. 03A01-9805-CH-00161

OPINION

McMurray, J.

The facts of this case, as material to this appeal, are relatively simple. The parties entered into a contract for the construction of a hotel in Gatlinburg, Tennessee. The contract was a standard Associated General Contractors Construction Manager contract styled "Standard Form of Agreement Between Owner and Construction Manager." The agreement contains two provisions that are germane to the issues under consideration here.

ARTICLE 14

Assignment and Governing Law

14.1 . . .

14.2 This Agreement shall be governed by the law of the place where the project is located.

ARTICLE 16

Arbitration

16.1 All claims, disputes and other matters in questions arising out of, or relating to, this Agreement or the breach thereof, except with respect to the Architect/Engineer's decision on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

We will first note that the "place where the project is located" is Gatlinburg, Tennessee, therefore paragraph 14.2, Article 14, if effective, makes Tennessee law the governing law concerning the contract. If this provision is ineffective, then, in any event, Tennessee law governs since the contract was entered into here and the project is located here.

A dispute, relating to the contract, arose between the parties. The dispute gave rise to a complaint in the Chancery Court for Sevier County by Frizzell for the purpose of enforcing a mechanic's lien and for breach of contract. Frizzell, the appellant here, specifically charged in its complaint, (styled "Complaint to Enforce Mechanic's Lien and for Breach of Contract") that the defendant, Gatlinburg, L.L.C., appellee here, "breached the construction management contract by failing to pay the amount owed under the construction contract." A judgment for damages over and above the amount claimed to be subject to the mechanic's lien was also

sought. Gatlinburg, L.L.C., filed its answer, a counterclaim and a third party action. Thereafter, Frizzell submitted a demand for arbitration. In its answer Gatlinburg denied that it owed Frizzell as alleged in the complaint but on the other hand, in its counterclaim, sought damages from Frizzell. Frizzell filed a motion to stay the court proceedings pending arbitration based on the contract provision. Gatlinburg opposed the motion and amended the counterclaim to allege that Frizzell fraudulently induced Gatlinburg to enter into the contract. It is this claim that constitutes the basis of this appeal.

The court heard the motion to stay. The court noted in its order that the "issue presented to the court is whether the arbitration proceeding should go forward or whether this court should take jurisdiction of all or some issues as between Frizzell and Gatlinburg." The court chose to retain jurisdiction to consider the legal issue of fraud in the inducement of the contract entered into by the parties in the primary case and ordered the parties not to submit this issue to the arbitrators. The court further determined that the arbitrators in the primary case should resolve the construction disputes between those parties and render a decision to the court.

This appeal resulted from this judgment of the trial court. The appellant presents the following issues for our consideration:

I. Whether the trial court erred in failing to find that the contract between Frizzell and Gatlinburg involved interstate commerce as defined under the Federal Arbitration Act?

II. Whether the trial court erred in holding that even if the contract between Frizzell and Gatlinburg involved interstate commerce that the Federal Arbitration Act did not apply.

The issue of whether the arbitration provisions of a contract require that a claim for fraud in the inducement of the contract be submitted to arbitration has been addressed and resolved in this jurisdiction. *See City of Blaine* v. *John Coleman Hayes & Assoc.*, 818 S.W.2d 33 (Tenn. App. 1991), *infra*. The court resolved the issue against requiring the issue to be arbitrated. We, therefore, agree with the result reached by the trial court.

The Uniform Arbitration Act was passed by our Legislature in 1983 and is now codified as T.C.A. § 29-5-301 – § 29-5-320. The provisions of the act pertinent to the controversy before us are T.C.A. § 29-5-302 which provides in pertinent part as follows:

> **29-5-302. Agreements to submit to arbitration - Jurisdiction.** - (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract, . . .

City of Blaine v. *John Coleman Hayes & Assoc.*, 818 S.W.2d 33 (Tenn. App. 1991), is a veritable treatise on the subject of whether "fraud in the inducement" is subject to arbitration. In *Blain*, Judge Crawford compared and contrasted the various resolutions of the issue in other jurisdictions including the position advanced by the United States Supreme Court.

In *Blain*, Judge Crawford speaking for this court noted:

> In 1983, when the Tennessee legislature passed the Uniform Arbitration Act, they had full knowledge of the long established right of a person to seek rescission of a contract procured by fraud. With this knowledge, we find it logical for the legislature to intend to except actions for rescission from a decision by arbitrators and giving the language of the statute its usual and ordinary meaning, the legislature did just that. This legislative intent is exemplified by Justice Black in the *Prima* [*Prima Paint Corp.* v. *Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967)] dissent. "Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated." 87 S.Ct. at 1810. It would be difficult to improve on this language.

Blaine, at page 38.

It is well-settled in Tennessee contract law that fraud in the inducement renders contracts voidable at the instance of the party upon whom fraud was perpetrated. It is clear that an individual induced by fraud to enter into a contract may elect between two remedies. He may treat the contract as voidable and sue for the equitable remedy of rescission or he may treat the contract as existing and sue for damages at law. *Vance* v. *Schulder*, 547 S.W.2d 927, 931 (Tenn. 1977); *Derryberry* v. *Hill*, 745 S.W.2d 287, 291 (Tenn. App. 1987); *Graham* v. *First Am. Nat'l Bank*, 594 S.W.2d 723, 726 (Tenn. App. 1979). Thus, when a party to a contract seeks rescission in a court of competent jurisdiction and alleges facts,

which if proved to the requisite degree, would justify rescission of a contract, the very existence of the contract is in limbo until the issue is resolved. To require arbitration pursuant to the terms of a contract concerning the validity or very existence of the contract is to presuppose the validity and existence of the contract at least for some purposes. We do not understand this to be the law in Tennessee. It has been held that fraud vitiates every contract ab initio. *Samuel* v. *King*, 158 Tenn. 546, 14 S.W.2d 963 (1929). Therefore, if there is no contract, there is no arbitration clause.

As to the issues as framed by the appellant, unless and until it is established that there is a contract in existence, a consideration of whether the contract is controlled by or subject to the Federal Arbitration Act is premature. Whether the contract should be rescinded and voided is a question that can be answered only after a trial on the merits. If it is rescinded, there is nothing to arbitrate. On the other hand, if the contract is found to be valid and binding, the disputes between the appellant and the appellee are subject to arbitration.

We affirm the judgment of the trial court in reserving the issue of fraud in the inducement as a question to be determined by the court. Costs of this appeal are assessed to the appellant and this cause is remanded to the trial court for such other and further action as may be necessary.

/s/
Don T. McMurray, J.

CONCUR:

/s/
Houston M. Goddard, Presiding Judge

/s/
William H. Inman, Senior Judge

APPENDIX C

[Dated May 8, 1998]

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

FRIZZELL CONSTRUCTION COMPANY, INC.

Plaintiff,

v.

SAMUEL K. COX, CONSTANCE COX WALKER, WILLIAM H. COX, GATLINBURG, L.L.C., TENNESSEE STATE BANK, A. RANDOLPH SYKES,

Defendants.

v.

GATLINBURG, L.L.C.,

Defendant, Counter-Plaintiff, and Third-Party Plaintiff

v.

UWE ROTHE, d/b/a ROTHE ARCHITECTURE AND PLANNING and WALTER SEEK,

Third-Party Defendants.

ORDER

This matter came on for hearing before the Honorable Chancellor Telford Forgety on the Motion to Reconsider

filed by Frizzell Construction Company, Inc. After reviewing the Motion, Response, Memoranda and attached exhibits thereto submitted by both parties and after hearing arguments of counsel, the Court hereby denies the Motion to Reconsider and incorporates herein by reference its Memorandum Opinion attached hereto.

IT IS SO ORDERED.

/s/
CHANCELLOR TELFORD FORGETY

APPROVED FOR ENTRY:

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IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

FRIZZELL CONSTRUCTION COMPANY, INC.,

Plaintiff,

v.

SAMUEL K. COX, ET AL.

Defendants.

No. 97-8-208

TRANSCRIPT OF EVIDENCE

April 23, 1998

BEFORE: Hon. Telford E. Forgety, Presiding

* * *

THE COURT: You're welcome.

Gentlemen and ladies, I appreciate your help in this case. You've done a lot of good work, a lot of good research. You've briefed the issue well. You've helped me as much as I think it is possible to help me.

I'm going to overrule the motion to reconsider. I am not satisfied, number one, that there's interstate commerce here in this particular contract; that is the contract between Frizzell and Gatlinburg, LLC. I'm not sure that all of these other things that came later, that came after the fact, make this contract involve interstate commerce so to bring the agreement under the FAA.

Even if that were not the case, I am not sure that even if there were interstate commerce that given the *Volt* decision of the United States Supreme Court that Tennessee law on the issue of fraud in the inducement might not yet be applicable in this day in time, as I observed earlier.

I've looked at the *Eichleay* case and studied it up. And I've studied the others as well as I can. It's clear to me that the United States Supreme Court has backed down from the broadest interpretation that it had been giving to the Federal Arbitration Act in the *Volt* decision. It applied a California statute, which Counsel here admits, and I think properly so, which is in conflict in some respects with the Federal Arbitration Act.

That indicates to me that if the particular issue were before the Tennessee Supreme Court today, the best guess I can make is that given the *City of Blaine* v. *John Coleman Hayes* decision that if the particular issue were before the Tennessee Supreme Court today, would a fraud in the inducement claim under Tennessee law be required to be submitted to an arbitrator under the Federal Arbitration Act or would the *Volt* decision apply to allow the fraud in the inducement claim to be submitted to the Court as required in the *City of Blaine* v. *John Coleman Hayes*. My conclusion is that the Supreme Court of Tennessee, if it were before it, would look at it and say, "In light of *Volt*, it appears that that fraud in the inducement claim would be saved to the Court under Tennessee law." I don't know that that's correct.

As I said, I just wish that we had a case that hit us directly between the eyes on that. We don't. We have

to put three or four things together. We've got to consider three or four things.

The *Eichleay* decision comes pretty close, at least based on the circumstances as they existed in 1982. But the *Eichleay* case did not really address the issue of fraud in the inducement claim. The issue there was, as the Court said, are agreements to arbitrate irrevocable at will. So they were dealing in the *Eichleay* case, and I think that colored the decision some. They were dealing with the situation where the question was, do we arbitrate at all, anything, as opposed to one particular issue that's saved to the Court, that is fraud in the inducement, where all other issues are subject to arbitration. And I think that colored the decision. Because, clearly, at that time and clearly now, the national policy as stated in the Federal Arbitration Act is that once you sign an arbitration contract you'll be required to arbitrate. Tennessee has that statute.

So I'm not sure that if the Tennessee Supreme Court had it today, even assuming interstate commerce, I'm not sure that under the *Volt* decision they would say that the issue of fraud in the inducement is yet one that must be sent to the arbitrator under the FAA. So I'll overrule the motion to reconsider.

Is there anything further?

MR. BERNSTEIN: No, Your Honor.

MR. HARRISON: That's all, Your Honor.

MR. BERNSTEIN: Your Honor, we'll write this in and bring it back to you.

THE COURT: Yes. Write that in and I'll sign it this morning. I apologize to you gentlemen for not having that order entered.

(End of proceedings.)

APPENDIX D

[Entered March 23, 1998]

WHALEY & SONS, INC.,

Plaintiff,

v.

FRIZZELL CONSTRUCTION COMPANY, INC., ET AL.

Defendants.

No. 97-10-303

ORDER

This cause came on to be heard before the Honorable Telford Forgety, Chancellor, holding the Chancery Court for Sevier County, Tennessee on the 6th day of February, 1998.

The Court in *Frizzell Construction Company, Inc.,* v. *Cox et al.*, No. 97-7-208 (hereafter the "Primary Case") had before it for consideration a Motion For Stay of Proceedings Pending Arbitration filed by Frizzell Construction Company, Inc. (hereafter "Frizzell"); a Motion for Stay of Arbitration Proceedings filed by Gatlinburg, LLC (hereafter "Gatlinburg"), a Motion for Scheduling Conference in the alternative, Motion For Consolidation filed by Gatlinburg; and a Motion To Shorten Time for Frizzell to respond to discovery filed by Gatlinburg.

At a hearing held on December 12, 1997, the Court was advised that there were seven other pending cases (hereafter "Subcontractor Cases") arising out of the construction of the Clarion Hotel in Gatlinburg, Tennessee, involving Frizzell as the general contractor and

Gatlinburg as the owner. The Court directed counsel for Frizzell and Gatlinburg to file a Motion to Consolidate or to arrange for a scheduling conference pursuant to Rule 16 of the Tennessee Rules of Civil Procedure. Notice of this hearing on February 6, 1998 was duly sent to counsel for all parties in all of the pending cases. (Since all of these cases have separate case numbers, a copy of this Order will be filed in each case.)

The record before the Court reflects that Frizzell filed its Complaint against Gatlinburg on August 1, 1997. Frizzell basically asserts a claim for monies due it under the construction contract. Gatlinburg filed its Answer and Counterclaim against Frizzell on October 14, 1997 and also filed at the same time a third-party complaint naming as third-party defendants Uwe Rothe (the architect for the hotel) and Walter Seek (the structural engineer for the hotel). Subsequently on November 3, 1997, Frizzell filed an application for arbitration pursuant to the contract between Frizzell and Gatlinburg. On November 11, 1997, Frizzell filed in this Court a Motion For Stay of Proceedings Pending Arbitration and on January 2, 1998, Gatlinburg filed in this Court a Motion for Stay of Arbitration Proceedings.

Thus, the issue presented to the Court is whether the arbitration proceedings should go forward or whether this Court should take jurisdiction of all or some of the issues as between Frizzell and Gatlinburg. The Court notes that none of the claims being asserted in the Subcontractor cases are subject to arbitration and this Court will have to deal with those claims.

Frizzell has argued that the arbitration clause in its contract with Gatlinburg must be adhered to by this Court and that it only filed the Primary Case against

Gatlinburg in this Court in order to establish its lien claim in a timely manner. Gatlinburg has advised the Court and Frizzell has acknowledged that Gatlinburg has furnished a bond to protect Frizzell on its alleged lien claim.

Gatlinburg has argued that its counterclaim against Frizzell asserts claims for fraud in the inducement, misrepresentation, indemnification from other lien claimants, construction deficiencies, delay damages and an accounting. Further, Gatlinburg has argued that its third-party complaint against Uwe Rothe and Walter Seek are not subject to the arbitration proceedings between Frizzell and Gatlinburg. Gatlinburg has also pleaded and advised the Court that it will, at the appropriate time, name as third-party defendants Fireman's Fund (the bonding company) and Southern Cast Stone (a supplier of exterior facing materials) to Frizzell.

Gatlinburg has urged this Court to retain overall jurisdiction of the Primary Case and the Subcontractor cases now pending before it and to determine the legal issues while referring the construction disputes in the Primary Case to arbitration. By doing so, the Court could avoid inconsistent findings that may result from the arbitrators making certain decisions on construction matters and the Court deciding some of those same issues between the other parties. Further, that the Court can better determine the other legal issues that arise in these proceedings.

Frizzell has urged this Court should not and cannot interfere with the arbitration inasmuch as the parties have provided for arbitration in their contract and have engaged in interstate commerce.

The Court has considered the argument of counsel, the pleadings and affidavits filed and the entire record.

The Court recognizes that the arbitration that has been initiated cannot resolve the Subcontractor cases that are before the Court nor can the arbitration proceedings resolve bond claims or product claims that are yet to be asserted. Most importantly, the arbitrators (None of whom are lawyers or judges. See affidavit of Cleste H. Hebert) cannot resolve the fraud in the inducement claim asserted by Gatlinburg. Accordingly, the Court will need to reserve the determination of legal issues and refer to arbitration the purely construction claims, all as set forth below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court will retain jurisdiction to consider the legal issue of fraud in the inducement of the contract entered into by the parties in the Primary Case and the parties are hereby ordered not to submit those issues to be arbitrators.

2. The arbitrators in the Primary Case will determine the construction disputes as between those parties and will render their decision to this Court and to the parties.

3. When the arbitrators have made a determination concerning construction disputes, the Court will then, if necessary, consider the Subcontractor cases.

4. The Court will give all applicable effect to the findings of the arbitrator and endeavor to fashion a judgment which will provide relief as may be appropriate between Gatlinburg LLC, Frizzell Construction

Company, Inc. and its subcontractors in all of these pending cases after the arbitration has been concluded so that the judgment of the arbitrators and the judgment of the Court shall be consistent as between Gatlinburg LLC and Frizzell Construction Company, Inc.

5. The Court denies the Motion to Consolidate all the above-styled pending actions and may schedule a conference in the future if the Court deems it appropriate.

6. The Motion of Gatlinburg to shorten time for Response to Discovery is withdrawn by Gatlinburg.

ENTER this 23 day of March, 1998.

/s/
TELFORD FORGETY
CHANCELLOR

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Supreme Court, U.S.
FILED
MAY 11 2000
CLERK

No. 99-1358

In The

Supreme Court of the United States

FRIZZELL CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

GATLINBURG, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

RESTATEMENT OF QUESTION PRESENTED

Whether this Court should review the decision of the Tennessee Supreme Court in which the Tennessee Supreme Court construed a Tennessee choice-of-law clause in a Tennessee contract according to Tennessee law.

RULE 29.6 STATEMENT

The caption contains the names of all the parties that appeared in the Tennessee Supreme Court. Gatlinburg, L.L.C. ("Gatlinburg") is a Tennessee limited liability company. There is no parent or publicly held company owning ten percent (10%) or more of the stock of Gatlinburg.

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Rhodes v. Consumers' Buyline, Inc., 868 F. Supp. 368 (D. Mass. 1993) 16

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STATUTES

28 U.S.C. § 1257(a) ..... *passim*

Tenn. Code Ann. § 29-5-301 – § 29-5-320 (Supp. 1990) 2, 17

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Rule 14(1)(g)(i) of the Supreme Court 6

OTHER

Thomas A. Diamond, *Choice-of-Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court Within Itself*, 39 Ariz. L. Rev. 36 (1997) 15

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Gatlinburg, L.L.C. ("Gatlinburg") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Frizzell Construction Company, Inc. ("Frizzell"), requesting that this Court deny Frizzell's Petition.

OPINIONS BELOW

The Award of the Arbitrators of the American Arbitration Association, Arbitration Tribunal, in the matter of Frizzell Construction Company, Inc. and Gatlinburg, L.L.C., Case No. 39 Y 110 00107 97, executed on September 1, 1998, is unreported and reproduced in the appendix hereto ("App.") at 1a. The Award is part of the state court Record in this case.

STATEMENT OF JURISDICTIONAL BASIS

Petitioner has attempted to invoke the jurisdiction of the Court under 28 U.S.C. § 1257(a).

Under 28 U.S.C. § 1257(a), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which the decision could be had "where the validity of a treaty or a statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

Respondent contends that § 1257(a) jurisdiction does not exist because Petitioner fails to show that a federal question was raised or decided below and Petitioner fails to show that the validity of any Tennessee statute was drawn into question on federal grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition for a Writ of Certiorari ("Petition"), the Tennessee Uniform Arbitration Act, codified at Tenn. Code Ann. § 29-5-301 – § 29-5-320 (Supp. 1990) ("TUAA"), is discussed in this case. Tennessee Code Annotated § 29-5-302 provides in pertinent part as follows:

> **Agreements to Submit to Arbitration – Jurisdiction.** – (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract, . . .

Respondent provides this reference to the Tennessee statute solely to support Respondent's contention in Part V of this Brief that the Federal Arbitration Act ("FAA") and the TUAA contain identical language and are consistent. The validity of the Tennessee Uniform Arbitration

Act has not been drawn into question on federal grounds by either the Petitioner or Respondent.

RESPONSE TO STATEMENT OF THE CASE

Although Respondent agrees with the broad outline of the Petitioner's Statement of the Case, Respondent maintains that Petitioner's statement glosses over the timing of the state court proceedings of this case in a way that may be misleading to this Court and should be corrected.

It is true that Frizzell filed an action on August 1, 1997, in the Chancery Court for Sevier County, Tennessee. The complete title of the action is "Complaint to Enforce Mechanic's Lien and for Breach of Contract." On October 14, 1997, Gatlinburg filed its Answer, Counterclaim, and Third Party Complaint, setting forth, among other things, its counterclaim that Frizzell had fraudulently induced it to enter into the contract. It was not until after Gatlinburg filed its Answer and Counterclaim that Frizzell filed its demand for arbitration with the American Arbitration Association on or about November 3, 1997. The Demand for Arbitration was served on Gatlinburg as an exhibit to Frizzell's Motion to Stay Proceedings Pending Arbitration filed on or about November 11, 1997. None of the pleadings filed by Frizzell invoked or even mentioned the FAA and the applicability thereof until Frizzell filed its Memorandum of Law in Support of its Motion to Stay Proceedings Pending Arbitration on or about December 11, 1997.

Petitioner correctly notes that the Chancery Court for Sevier County granted Frizzell's request for a stay and submitted its claim for payments under the contract to arbitration, but enjoined arbitration of Gatlinburg's fraudulent inducement claim. Petitioner fails to mention that the parties submitted all issues in dispute with the exception of fraud in the inducement to arbitration with the American Arbitration Association and that the American Arbitration Association, Arbitration Tribunal issued an Award of the Arbitrators on September 1, 1998. The arbitration panel decided in favor of Frizzell on the issue of payments and granted an award to Frizzell in the amount of $651,325.00 in full settlement of all claims and counterclaims submitted in the arbitration. The Award of the Arbitrators is reproduced in the Appendix hereto. Gatlinburg's claim that Frizzell fraudulently induced it to enter into the contract was an issue reserved for judicial determination *after*, not before, the parties completed the arbitration process of all other claims.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition. This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because Petitioner has failed to show that a federal question was raised and decided in the state court proceedings and Petitioner has failed to show that any Tennessee statute was drawn into question on federal grounds. The judgment of the Tennessee Supreme Court rested on independent and adequate state grounds. This is a case involving the interpretation by Tennessee state courts of a Tennessee choice-of-law clause in a contract executed by two Tennessee parties.

The Tennessee Supreme Court's decision was guided by and is compatible with this Court's precedents and fully supports the policies underlying the Federal Arbitration Act.

I. THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a).

Respondent contends that § 1257(a) jurisdiction does not exist because Petitioner has failed to show that a federal question was raised and decided in the state court proceedings and Petitioner has failed to show that any Tennessee statute was drawn into question on federal grounds. Petitioner bears the burden of establishing this Court's jurisdiction, *Durley v. Mayo*, 351 U.S. 277, 285 (1956), and has failed to carry that burden.

Under 28 U.S.C. § 1257(a), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which the decision could be had "where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

This Court lacks appellate jurisdiction if a federal question was not raised or decided in the state court below: "If both of these do not appear on the record, the appellate jurisdiction fails." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citing *Crowell v. Randell*, 10 Pet. 368, 391 (1836)). To establish jurisdiction, it is essential:

> [T]hat it must appear affirmatively from the record, not only that a federal question was

> presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. New York ex rel. Pierson, 293 U.S. 52, 55 (1934).

Petitioner's Statement of the Case fails to specify exactly what federal question was raised and decided below and at what point or points in the state court proceedings a federal question was raised or decided as required by Rule 14(1)(g)(i) of the Supreme Court.

The opinions below do not show that a federal question was sufficiently and properly raised or decided. As will be discussed in Parts IV and V of this Brief, the Tennessee Supreme Court looked to the precedents of this Court to guide its application of state law but not as the dispositive basis for its decision. It is clear from the face of the opinion that the Tennessee Supreme Court primarily based its interpretation of the arbitration contract on ordinary state-law contract principles as set forth in Tennessee case law.

Petitioner also fails to show that any Tennessee statute was drawn into question on federal grounds. Specifically, Petitioner does not address the TUAA or allege that the TUAA is repugnant to federal law. Petitioner does not provide any reference to or the verbatim text of any Tennessee statute as required by Rule 14(1)(f) of the Supreme Court.

Petitioner did not and cannot draw any Tennessee statute into question under the circumstances of this case. The Tennessee Supreme Court's decision was not based on a state statute and the decision was not in favor of any state statute as opposed to federal law. The Tennessee Supreme Court decided the case pursuant to Tennessee law and ordinary state-law principles regarding contract interpretation.[1]

II. THE TENNESSEE SUPREME COURT'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

If this Court should determine that a federal question was sufficiently and properly raised and decided below,

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[1] In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), this Court addressed the issue of § 1257(a) jurisdiction in a case involving the judgment of the California Court of Appeal. *Id.* at 472 n.4. The Court concluded that appellate jurisdiction was assured because the appellant explicitly drew into question the validity of a California arbitration statute on federal grounds, contending that the statute was pre-empted by the FAA and thus invalid under the Supremacy Clause. *Id.* The California Court of Appeal upheld the statute against the federal challenge and jurisdiction was found because the Court of Appeal's decision was based on the applicability of the state statute to the arbitration agreement. *Id.*

In this case, Petitioner did not bring any state statute into question on federal grounds. The state courts did not address the validity of the Tennessee Uniform Arbitration Act or any other state statute. The Tennessee Supreme Court did not rest its decision on the FAA, the TUAA or any other state statute.

Respondent, in the alternative, contends that the judgment of the Tennessee Supreme Court in this matter is based on separate, adequate and independent state grounds and thus is not subject to this Court's review.

This Court adheres to the long-standing principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). If it is not clear whether the state court's decision rested on a federal ground or an adequate state ground, the Court will not review the decision. *Id.* at 126. If the judgment of the state court rests on two grounds, one involving a federal question and the other a state ground, and the ground independent of the federal question is sufficient to sustain the judgment, this Court will not take jurisdiction. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934). If the state court decision clearly shows that it is based on "bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Respondent submits that the judgment of the Tennessee Supreme Court did not rest on a determination of a federal question. The opinion shows that the Tennessee Supreme Court considered, for purposes of guiding its own interpretation of the Tennessee arbitration agreement, certain of this Court's precedents involving application of the FAA and the underlying policies of the FAA. However, the judgment of the Tennessee Supreme Court was fundamentally based on ordinary state-law contract principles as set forth in Tennessee case law, in particular, the primacy of the parties' intentions and the importance of reading the contract as a whole and harmoniously

construing all provisions. Slip Opinion, App. 1 to the Petition ("Slip Opinion") at 9a-10a.

III. THE TENNESSEE SUPREME COURT INTERPRETED A PRIVATE CONTRACT BETWEEN TENNESSEE PARTIES AND APPLIED ORDINARY STATE-LAW CONTRACT PRINCIPLES.

This is a case involving the interpretation by Tennessee state courts of a Tennessee choice-of-law clause in a contract executed by two Tennessee entities. The parties chose the law of their home state as the applicable law and the Tennessee Supreme Court with its superior expertise in matters involving Tennessee law decided this case based on that law.

The Tennessee Supreme Court held that the choice-of-law clause of the contract, which expressly states that it is governed by Tennessee law, means that the parties agreed to arbitrate only those issues that are arbitrable under state law. Slip Opinion at 11a.

This Court has emphasized that the construction of state contract law by state courts is not ordinarily subject to its review. In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), this Court noted: "Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. *See also Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981) ("The state court found that the contract had been breached. We will not overturn the construction of Louisiana law by the highest court of that State."); *cf. Michigan v. Long*, 463 U.S. 1032, 1039 (1983)

("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar.").

In decisions involving arbitration clauses, this Court repeatedly has distinguished its deferential review of state courts interpreting their own laws from its de novo review of federal courts exercising diversity jurisdiction and applying state law under the *Erie* doctrine.

In *Volt*, this Court deferred to the California Court of Appeal's construction of a choice-of-law clause that the clause incorporated a California statute, which allowed a court to stay arbitration pending resolution of related litigation involving third parties not bound by the arbitration agreement. *Id.* at 475.

In cases involving de novo review of the decisions of federal courts exercising diversity jurisdiction in interstate commerce matters, including *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court has reversed federal courts on the basis that the federal courts incorrectly interpreted or misapplied state law. *Mastrobuono*, 514 U.S. at 64.

In Footnote 4 of *Mastrobuono*, this Court emphasizes the distinction between the two types of judicial review:

> The dissent makes much of the similarity between this choice-of-law clause and the one in *Volt*, which we took to incorporate a California statute allowing a court to stay arbitration pending resolution of related litigation. In *Volt*, however, we did not interpret the contract de novo. Instead we deferred to the California court's construction of its own state's law . . . ("the interpretation of private contracts is ordinarily a

> question of state law, which this Court does not sit to review"). In the present case, by contrast, we review a federal court's interpretation of this contract, and our interpretation accords with that of the only decision-maker arguably entitled to deference – the arbitrator.

514 U.S. at 60 n.4 (citations omitted).

The Tennessee Supreme Court has the necessary expertise to interpret contracts governed by Tennessee law. By granting this Petition, this Court would place itself in the position of interpreting and potentially rewriting Tennessee contract law. If this Court decides this case in favor of the Petitioner, this Court will necessarily be required to hold that the Tennessee Supreme Court has misstated Tennessee law. In keeping with federalism principles and its respect for the independence of state courts, this Court has recognized that this Court's role is not to interfere with the state high courts' interpretation of their own laws and application of ordinary state-law principles. This Court should deny the Petition and allow the Tennessee Supreme Court to interpret contracts according to Tennessee law.

IV. THE TENNESSEE SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS INCLUDING *VOLT* AND *MASTROBUONO*.

Frizzell maintains that this Court should grant its Petition because the decision of the Tennessee Supreme Court directly conflicts with this Court's precedents and particularly with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Frizzell

contends that the Tennessee Supreme Court did not properly consider this Court's previous decisions and "flouts the rule of *Mastrobuono*." Petition at 11.

Respondent contends that the Tennessee Supreme Court examined and discussed certain of this Court's opinions and the language of the FAA to guide its application of state law. The decision was compatible with and does not conflict with this Court's previous rulings, including *Mastrobuono*.

Specifically, the Tennessee Supreme Court reviewed certain of this Court's decisions regarding the FAA for guidance in its application of state law in this case. In keeping with this Court's contract interpretations and concern with the parties' intent in previous decisions, the Tennessee Supreme Court construed together the arbitration clause and the Tennessee choice-of-law clause in the parties' contract to mean that the parties intended to arbitrate only those issues that are arbitrable under Tennessee law. The Tennessee Supreme Court concluded:

> [T]he FAA requires the courts of this state to enforce arbitration agreements according to their terms. Because the parties in this case have agreed to arbitrate their disputes to the extent allowed by Tennessee law, we therefore hold that the Chancery Court properly submitted all issues relating to the merits of the contract to arbitration. We also hold that the Chancery Court properly withheld the issue of fraudulent inducement from arbitration in accordance with the intention of the parties.

Slip Opinion at 11a.

The Tennessee Supreme Court's decision is harmonious with this Court's decision in *Volt* where the Court deferred to the California Court of Appeal's decision that the parties' choice-of-law clause incorporated California statutory arbitration rules which allowed the stay of arbitration even though the FAA would have otherwise permitted arbitration to go forward. *Volt*, 489 U.S. at 478-79. The *Volt* court found that "by permitting the courts to 'rigorously enforce' such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." *Id.* at 479 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

The Tennessee Supreme Court's decision does not directly conflict with the Court's ruling in *Mastrobuono* or allow state arbitration law to displace federal arbitration law, as Petitioner claims. Petition at 11-12.

In *Mastrobuono*, this Court looked to the intent of the parties, following standard contract law principles. In its de novo review of the parties' agreement, the Court emphasized that the "FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." 514 U.S. at 57-58. The Court found that the parties' intent, as evidenced in their agreement, was to permit the arbitration panel to award punitive damages even though a New York statute would have prohibited such damages. *Id.* at 63-64. The Court reasoned that the parties agreed to an arbitration clause providing that arbitration was to be governed by the rules of National Association of Securities Dealers ("NASD"), which authorized the award of punitive damages. *Id.* at 61-62.

In determining the intent of the parties, the Court found that the arbitration clause incorporating the rules of NASD showed that the parties agreed to permit punitive damages and that the parties' intent outweighed the general choice-of-law clause, incorporating the New York statute, which would have precluded such damages. *Id.* at 61-62. The Court concluded that the choice-of-law clause introduced ambiguity into an arbitration agreement that otherwise would have allowed punitive damages. *Id.* at 62. The Court applied common law rules of contract interpretation: ambiguous language should be construed against the party drafting it and a document should be construed to render all provisions consistent with each other. *Id.* at 63.

The instant case can be distinguished from *Mastrobuono*. First, if this Court determines it has § 1257(a) jurisdiction and grants the Petition, this Court does not sit to interpret the arbitration agreement de novo. This Court's review of the Tennessee Supreme Court's decision would be deferential, not de novo. *Mastrobuono*, 514 U.S. at 60 n.4. Second, a New York statute precluding punitive damages in an arbitration award was at issue in *Mastrobuono*. There is no Tennessee statute at issue in this case. Third, the Tennessee Supreme Court found no ambiguity in the language of the arbitration agreement that would permit the arbitration provision to negate the parties' intent underlying the general choice-of-law clause. Slip Opinion at 9a-10a.

In the opinion below, the Tennessee Supreme Court applied established state law and looked to the parties' intentions in the contract. Following Tennessee precedents, the court construed the arbitration clause and the

Tennessee choice-of-law clause to mean that the parties intended to submit all disputes to arbitration to the extent permitted by state law, e.g., all issues except contract formation issues. *Id.* at 10a. Although the outcome in this case is necessarily different from the outcome in *Mastrobuono*, the decision of the Tennessee Supreme Court was guided by and compatible with the contract interpretation principles applied by this Court in *Mastrobuono*.

Frizzell also urges this Court to review the decision of the Tennessee Supreme Court because it allegedly conflicts with the decision of the Court of Appeals for the Sixth Circuit as well as the decisions of other federal circuits and state high courts. In accordance with established federalism and jurisdictional principles, the Sixth Circuit's decisions are not binding on the Tennessee Supreme Court where a question of contract interpretation under Tennessee law is involved and neither are the decisions of other federal circuits and state high courts. In addition, Respondent notes that other federal circuits, federal district courts and state courts have rendered decisions consistent with the Tennessee Supreme Court decision.[2]

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[2] *See* Thomas A. Diamond, *Choice-of-Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court Within Itself*, 39 Ariz. L. Rev. 36 (1997), which cites as follows:

> *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395-96 (D.C. Cir. 1995) (construing clause to require application of Connecticut's arbitration law providing a 30-day statute of limitations for vacating arbitration awards); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991)

V. THE TENNESSEE SUPREME COURT'S DECISION SUPPORTS THE POLICIES UNDERLYING THE FEDERAL ARBITRATION ACT.

This is a case in which the holding arises from the application of ordinary state-law contract principles, not the application of the Federal Arbitration Act. Nonetheless, Respondent emphasizes that the decision of the Tennessee Supreme Court is consistent with the language of

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(construing clause to require application of New York's arbitration law prohibiting an arbitrator from awarding punitive damages); *Jeppsen v. Piper, Jaffray & Hopwood, Inc.*, 879 F. Supp. 1130, 1135 (D. Utah 1995) (construing clause to require application of Minnesota's arbitration law regarding timeliness of motion to vacate arbitration award); *Rhodes v. Consumers' Buyline, Inc.*, 868 F. Supp. 368, 373 (D. Mass. 1993) (construing clause to require application of New York's arbitration law, invalidating agreement to arbitrate); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana*, 835 F. Supp. 406, 413 (N. D. Ill. 1993) (construing clause to require application of New York's arbitration law prohibiting an arbitrator from awarding punitive damages); *Melun Indus., Inc. v. Strange*, 898 F. Supp. 995, 999 (S.D.N.Y. 1992) (construing clause to require application of New York's arbitration law prohibiting arbitrator from modifying award); *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 318 (D.D.C. 1991) (construing clause to require application of Ohio's arbitration law prohibiting arbitration of a dispute within a contract judicially declared invalid).

39 Ariz. L. Rev. at 35 n.90, all of which are consistent with the decision of the Tennessee Supreme Court in this case.

both federal and state arbitration acts and fully supports the policies of the FAA.

Section 2 of the FAA, 9 U.S.C. § 2, provides that a written agreement to arbitrate "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The Tennessee Uniform Arbitration Act mirrors the FAA. Tennessee Code Annotated § 29-5-302 provides that a written agreement to arbitrate shall be "valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract, . . . "

As this Court confirms, the FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Volt*, 489 U.S. at 474, and its policy "is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. The FAA has no express preemptive provision and state law is preempted only to the extent that it conflicts with or blocks the full purposes of the FAA. *Id.* at 477. The FAA does not require parties to arbitrate all claims:

> Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreements. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

Id. at 478 (citations omitted).

The Tennessee Supreme Court was guided by *Volt*'s holding that the purpose of the FAA is to ensure that parties' agreements to arbitrate are enforced according to the terms of the agreement. Slip Opinion at 6a-7a. Consistent with this Court's reasoning in *Volt* and state-law contract principles, the Tennessee Supreme Court concluded that "parties cannot be forced to arbitrate claims that they did not agree to arbitrate." *Id.* at 7a (citing *Volt*, 489 U.S. at 476; *Mastrobuono*, 514 U.S. at 57; *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986)). The Tennessee Supreme Court reasoned that if the parties agreed not to submit the claim of fraudulent inducement to arbitration, the parties cannot be compelled to arbitrate the claim, even though the claim itself can be arbitrated under the FAA. Slip Opinion at 8a.[3]

This construction by Tennessee's high court is fully consistent with the FAA's purpose of enabling private parties to arbitrate in accordance with their wishes. Also, it is consistent with this Court's instruction that courts should generally apply "ordinary state-law principles" in determining whether the parties have agreed to submit certain issues to arbitration. *See First Options of Chicago,*

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[3] The Tennessee Supreme Court addressed Frizzell's argument that this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), compels arbitration of the fraudulent inducement claim, explaining that the parties in *Prima Paint Corp.*, unlike the parties in the instant action, did not intend to withhold the fraudulent inducement claim from arbitration and that if the evidence showed such intent, a different conclusion may have resulted. *Id.* at 8a n.11 (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("[C]ourts generally should apply ordinary state-law contract principles that govern the formation of contracts. . . . The relevant state law here [Illinois], for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration."). Relying on Tennessee case law, the Tennessee Supreme Court interpreted the arbitration and choice-of-law clauses according to applicable state law principles relating to the intention of the parties and the requirement for reading the contract as a whole. The court relied on and cited several Tennessee precedents to hold that the parties may choose the arbitration law by which they will be governed. Slip Opinion at 9a-11a.

In this matter, the parties agreed to arbitrate and indeed have submitted all their disputes to arbitration to the extent permitted by Tennessee law. Submitting the issue of fraudulent inducement for judicial resolution according to Tennessee law does not subvert or undermine the proarbitration policies behind the FAA, policies which the parties have convincingly supported by the submission of their claims to binding arbitration.

As its final reason for urging this Court to grant the Petition, Frizzell maintains that the question presented is important and recurring. Although a question involving the interpretation of a Tennessee contract is indeed important in the State of Tennessee, it does not rise to a level of national interest so as to compel this Court to review the decision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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**Counsel of Record*

ATTACHMENT "A"

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of the Arbitration between

Frizzell Construction Company, Inc.
– and –
Gatlinburg, LLC

Case Number: 39 Y 110 00107 97

AWARD OF THE ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated April 4, 1995, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Gatlinburg, LLC shall pay to Frizzell Construction Company, Inc. the sum of Six Hundred Fifty-One Thousand Three Hundred Twenty-Five Dollars and No Cents ($651,325.00) within thirty (30) days from the final date of this Award, itemized as follows:

CLAIM ITEM	AMOUNT
Amount invoiced for construction	$6,484,103.00
Less: Labor charged after 4/28/97	<35,541.00>
Less: Adjustments for "miscellaneous" items	<131,910.00>
Less: Credits per Invoice #24	<38,715.00>
Subtotal	$6,277,939.00

Less: Adjustment for general conditions	<221,444.00>
Subtotal	$6,056,493.00
Less: Credit to owners – defective/incomplete work	<115,422.00>
Subtotal	$5,941,071.00
Less: Amount paid to contractor	<5,382,792.00>
Past due amount to contractor	558,279.00
Interest due on past due amount	93,046.00
TOTAL AMOUNT DUE	$ 651,325.00

SIGNED: /s/ Edwin Rodgers, Jr. DATE: 8/31/98
Edwin Rodgers, Jr.,
Arbitrator

State of Tennessee
County of Davidson

I, Edwin Rodgers, Jr., do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED:/s/ Edwin Rodgers, Jr. DATE: 8/31/98
Edwin Rodgers, Jr.,
Arbitrator

All claims or counterclaims not expressly granted are hereby denied.

Each party shall bear their own attorney's fees and costs.

The administrative fees of the American Arbitration Association totalling Seventeen Thousand Six Hundred

Twenty-Three Dollars and No Cents ($17,623.00) shall be borne equally.

The compensation and expenses of the arbitrators totalling Twenty-Eight Thousand One Hundred Fifty-Four Dollars and Ninety-Three Cents ($28,154.93) shall be borne equally.

This Award is in full settlement of all claims and counterclaims submitted in this arbitration.

SIGNED: /s/ William D. Reeves DATE: 9-1-98
William D. Reeves,
Arbitrator

State of Georgia
County of Dekalb

I, William D. Reeves, do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED: /s/ William D. Reeves DATE: 9-1-98
William D. Reeves,
Arbitrator

SIGNED: /s/ Firooz Israel DATE: 9-1-98
Firooz Israel,
Arbitrator

State of Georgia
County of Dekalb

I, Firooz Israel, do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED: /s/ Firooz Israel
Firooz Israel,
Arbitrator

DATE: 9-1-98

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

(3)

No. 99-1353

IN THE

Supreme Court of the United States

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 99-1353

FRIZZELL CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

GATLINBURG, L.L.C.,

Respondent.

REPLY BRIEF FOR PETITIONER

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1. While it tries to conjure up various reasons not to resolve it, respondent does not deny the basic conflict giving rise to this petition: in a case involving a dispute arising under the same form contract subject to the Federal Arbitration Act ("FAA"), the federal courts will—and, indeed, under this Court's decision in *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995), *must*—enforce the parties' agreement to arbitrate "all claims or disputes" arising under the contract regardless of any contrary state law rule, while the Tennessee Supreme Court will—in direct conflict with *Mastrobuono* and numerous other federal and state court decisions—refuse to enforce that agreement with respect to claims that are not arbitrable under state law. Same FAA contract. Same claim. But "necessarily different" result (Opp. at 15), depending on whether the case is in

federal or state court. The FAA was enacted to prevent just this sort of dichotomy, *see* Pet. 17, and this Court should grant certiorari to eliminate it here.

2. While respondent does not deny that the contract in this case is governed by the FAA, it nevertheless argues that this Court lacks jurisdiction to review the Tennessee Supreme Court judgment refusing to enforce the parties' agreement to arbitrate "[a]ll claims, disputes and or other matters" arising out of the contract. Pet. App. at 2a. Respondent is wrong.

a. Just as in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 473 n.4 (1989), petitioner here "explicitly drew in question the validity of [the pertinent state arbitration statute] on federal grounds, contending that the statute, as applied [to defeat the parties' agreement to arbitrate], was pre-empted by the FAA and thus invalid under the Supremacy Clause." *See* Appellant's Br. in Tenn. S. Ct. at 22 ("Frizzell argues that the [FAA] and federal substantive law interpreting the FAA pre-empts inconsistent Tennessee law"), 31 ("Frizzell urges this Court to find that * * * the FAA pre-empts Tennessee state law, and in particular Tennessee's Arbitration Act"); *accord* at 19-22, 35. Indeed, an entire *section* of petitioner's brief below was devoted to the argument that the FAA preempts conflicting Tennessee law providing for the adjudication rather than arbitration of fraudulent inducement claims. *See id.* at 26-32; *see also* Appellant's Reply Br. in Tenn. S. Ct. at 6-11 (same). In

the face of this record, the suggestion that no federal argument was raised below is altogether specious.[1]

This leaves respondent's argument that this Court lacks jurisdiction because the Tennessee Supreme Court chose—a skeptic might say, not unintentionally—to ignore petitioner's federal preemption argument and, instead, bury its holding that the conflicting Tennessee statute governed the arbitration dispute in this case in a purported interpretation of the contract. *See* Opp. at 5-11. But *Volt* answers this claim, too. There is no requirement that the state court judgment "directly address the validity of the [conflicting state] statute itself." 489 U.S. at 473 n.4. Rather, this Court has jurisdiction to

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[1] Petitioner cited the conflicting Tennessee statute—"Tenn. Code Annot. § 29-5-301 *et seq.*," Tenn. S. Ct. Br. at 21—by title and, indeed, even appended a copy of it to its brief. Petitioner also explained that *City of Blaine* v. *John Coleman Hayes & Assocs., Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991), interpreted the Tennessee Uniform Arbitration Act ("TUAA") to require "a judicial determination on the issue" of fraud in the inducement of a contract, expressly disagreeing with the contrary FAA rule adopted in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 400 (1967). *See* Tenn. S. Ct. Br. at 19-21. The courts below also acknowledged the conflict between the TUAA and FAA. *See* Pet. App. at 8a n.10; *id.* at 17a-18a.

Likewise, the petition plainly states the basic conflict between federal and state law giving rise to the question presented by this case. There is scarcely a page of the petition that does not discuss this conflict; the petition begins by setting forth the Supremacy Clause (Pet. at 2); and, in particular, the petition explains that under *Blaine*—which was adopted by the Tennessee Supreme Court below—the "Tennessee Arbitration Act" requires adjudication of fraudulent inducement claims—in direct conflict with the FAA rule recognized in *Prima Paint*. Pet. at 6 n.1. *See id.* at 11.

review a state court judgment applying state law "against the contention that such application is invalid on federal grounds, regardless of the particular grounds or reasons on which [the state court's] decision is put." *Id.* (citations omitted; brackets in original). Significantly, the *Volt* Court further held that this jurisdictional rule applies "*even though the [state] court's decision may have been premised on its interpretation of the contract.*" *Id.* (emphasis added). Respondent takes a stab at distinguishing *Volt* on the ground that "[p]etitioner [here] did not bring any state statute into question on federal grounds." Opp. at 7 n.1. But, as explained, that statement is utterly refuted by the record.

b. None of this should come as a surprise. If respondent's understanding of this Court's jurisdiction were correct, an enormous loophole would be opened to the enforcement of federal rights. State courts would be free to extinguish federal rights—including the "national substantive law" established by the FAA, *Prima Paint*, 388 U.S. at 400, to "revers[e] centuries of judicial hostility to arbitration agreements," *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 225 (1987) (citation omitted)—simply by purporting to ground their decisions in state law, taking comfort in the fact that their decisions would be unreviewable in this Court. But as established in *Volt* and the other cases in which this Court has found jurisdiction to review state court decisions interpreting FAA contracts in a manner that frustrates federal arbitration law,[2] this is not the law.

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[2] *See also, e.g.*, *Perry* v. *Thomas*, 482 U.S. 483, 489 n.7 (1987) (Section 1257 confers jurisdiction to review state court judgment refusing to enforce agreement in FAA contract to arbitrate all

Review of a decision rejecting a claim of federal preemption can hardly be blocked by the lower court's reliance on the very state law claimed to be preempted.[3]

3. When it comes to the merits, respondent also seeks cover in state law—and state law alone—arguing that the Tennessee Supreme Court was free to interpret the arbitration agreement as it saw fit, "according to Tennessee law." Opp. at i, 11. But in doing so, respondent merely joins issue on the basic question presented—whether in refusing to enforce the parties' arbitration agreement, the state court improperly displaced federal arbitration law with conflicting state law.

a. The FAA establishes a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); Pet. at 3. *See also, e.g.*, *Smith Barney, Inc.* v. *Critical Health Sys. of N.C., Inc.*, __ F.3d __, 2000

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claims or disputes arising under contract, due to conflicting state law); *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (Section 1257 confers jurisdiction to review state court judgment where "the effect of the judgment * * * is to nullify a valid [FAA] contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration").

[3] The Court's treatment of the jurisdictional issue in *Volt* and cases cited in note 2, *supra*, also disposes of respondent's related suggestion that the decision below rests on an independent and adequate state law ground. *See* Opp. at 8. This argument is also refuted by the longstanding rule that "independent and adequate state ground" doctrine does not divest this Court of jurisdiction "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter." *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

WL 572470, at *4 n.1 (4th Cir. 2000) ("arbitration contracts [subject to FAA] must be construed in accordance with federal law"). Of course, under the FAA "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. But in construing arbitration agreements subject to the FAA, courts nevertheless remain bound by the "body of federal substantive law of arbitrability." *Moses H. Cone*, 460 U.S. at 24. *See Southland Corp.* v. *Keating*, 465 U.S. at 12 (emphasizing that this "substantive law" is "applicable in state and federal court").

One of the federal rules governing arbitration agreements subject to the FAA is that a general choice-of-law provision should *not* be interpreted to incorporate state law that would defeat the parties' agreement to arbitrate all claims or disputes arising under the contract. That is the teaching of *Mastrobuono*, which involved the interpretation of an FAA contract with virtually identical choice-of-law and arbitration provisions, *see* Pet. at 8-13; it follows directly from *Ferro Corp.* v. *Garrison Industries, Inc.*, 142 F.3d 926 (6th Cir. 1998), which is on all fours with this case, *see* Pet. at 14-17; and it is reaffirmed by the numerous other federal and state court decisions discussed in our petition. *See id.* at 17-23. Indeed, since the filing of this petition, still more decisions have been issued that acknowledge and heed this important federal rule of law. *See, e.g., Smith Barney, Inc.*, __ F.3d at __, 2000 WL 572470, at *4 n.1.[4]

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[4] The rule of *Mastrobuono* may also be explained in terms of the federal mandate that in construing FAA contracts ambiguities should be resolved in favor of arbitration. *See* Pet. at 10-11 (discussing *Mastrobuono*); *Moses H. Cone*, 460 U.S. at 24-25

b. The decision below directly conflicts with this growing body of precedent, and respondent has almost nothing to say in response. With respect to *Ferro* and the other lower court decisions discussed in the petition, respondent replies that those decisions "are not binding on the Tennessee Supreme Court." Opp. at 15. But of course, that is true with respect to any conflict among the lower courts; this Court grants certiorari to resolve such conflicts to ensure that federal law is uniformly enforced across the land. *See* S. Ct. Rule 10(b). Respondent also asserts that "other federal circuits, federal district courts and state courts have rendered decisions consistent with the Tennessee Supreme Court decision." Opp. at 15. But of course, that only underscores the entrenched nature of the conflict. *See id.* at 15-16 n.2.

Respondent's effort to deal with *Mastrobuono* is no more availing. Without identifying a single difference between the contract in this case and the one in *Mastrobuono*, respondent suggests that this case is distinguishable because the Tennessee Supreme Court "construed the arbitration clause and the Tennessee choice-of-law clause to mean that the parties intended to submit all disputes to arbitration *to the extent permitted by state law*," Opp. at 14-15 (emphasis added)—precisely the result that this Court found "untenable" in *Mastrobuono*. 514 U.S. at 64. But unless the Tennessee Supreme

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("The [FAA] establishes that, *as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "the problem at hand is the construction of the contract language itself.") (emphasis added); *Jeereddi A. Prasad, M.D., Inc.* v. *Investors Assocs., Inc.*, 82 F. Supp. 2d 365, 369-370 (D.N.J. 2000) (discussing *Mastrobuono*).

Court is free to disregard the rule of *Mastrobuono*—the basic question presented here—the fact that the Tennessee high court would interpret the *same* FAA contract differently—and thereby incorporate state law abrogating the parties' agreement to arbitrate *all* claims arising under the contract—is not a distinction that should allow for the displacement of federal law. If anything, it simply underscores the need for this Court's review to safeguard the important federal interests at stake.[5]

c. Respondent also argues that this case is governed by *Volt*, not *Mastrobuono*. *See* Opp. at 12-14. As we have explained (Pet. at 21-23), a good reason to grant certiorari here is to resolve the deepening conflict and confusion that exists in the lower courts over the significance of *Volt* in the wake of *Mastrobuono*. This case provides an ideal vehicle to do so, and to reaffirm that the substantive federal law of arbitration extends with equal force—just like every other arm of federal law—to the state courts. In any event, as we also explained (Pet. at 13), *Volt* is readily distinguishable from this case and *Mastrobuono*: in *Volt* this Court upheld a state court decision holding that a general choice-of-law provision incorporated state procedural rules that "generally *foster[ed]* the federal policy favoring arbitration,"

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[5] Respondent also tries to distinguish *Mastrobuono* on the ground that it involved "a New York statute," whereas "[t]here is no Tennessee statute at issue in this case." Opp. at 14. It is not apparent why this distinction should make any difference, but in any event the conflicting state law in *Mastrobuono* was a ruling of "the New York Court of Appeals * * * that in New York the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators." 514 U.S. at 55. As explained, the conflicting state law here is the TUAA.

489 U.S. at 476 & n.5 (emphasis added), whereas this case and *Mastrobuono* concern whether a general choice-of-law provision incorporates state law that, if given effect, would directly *contravene* the federal policy favoring arbitration. *See* Pet. at 13. Respondent never even addresses this basic distinction.

4. Contrary to the suggestion of respondent (Opp. at 16-19), the decision below assuredly does *not* promote the policies underlying the FAA. Just the opposite. The Tennessee Supreme Court invoked conflicting state law to abrogate the parties' agreement to arbitrate *all* claims or disputes arising out of their contract. The decision below therefore evidences just the sort of "judicial hostility to arbitration agreements" that led to the enactment of the FAA. *Shearson/American Express*, 482 U.S. at 225-226. *See also Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate."). At the same time, the decision below makes the federal "right to enforce an arbitration contract * * * dependent for its enforcement on the particular forum in which it is asserted," *Southland Corp.* v. *Keating*, 465 U.S. at 15, again frustrating Congress' intent. *See Allied-Bruce Terminix*, 513 U.S. at 272 ("Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitrations in similar cases."); Pet. at 17.

5. Finally, the fleeting suggestion that this case is not of general importance (Opp. at 19) is resoundingly answered by the brief of the Associated General Contractors of America, Inc. ("AGC") in support of certiorari. Thousands of AGC's members—engaged in

myriad projects across the land—rely on standard form contracts just like the one at issue here to guarantee that disputes will be resolved by arbitration. AGC Br. at 8. These contracts—most of which are subject to the FAA—"seek to bring uniformity and predictability to the business and legal transactions attending to the construction business." *Id.* at 8-9. The Tennessee Supreme Court decision in this case "effectively thwarts this objective," "will serve as a basis for other state courts to undermine the national policy of the FAA," and, thus, creates enormous uncertainty as to the enforceability of hundreds if not thousands of existing arbitration agreements across the country. *Id.* at 9.

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 99-1353

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

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IN THE

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No. 99-1353

FRIZZELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

GATLINBURG, L.L.C.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Pursuant to Rule 37.3(b), The Associated General Contractors of America, Inc. ("AGC") hereby moves for leave to file the accompanying brief as an *amicus curiae* in support of the position of Petitioner Frizzell Construction Company, Inc. ("Frizzell"), seeking a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case. The consent of Frizzell has been received. Respondent Gatlinburg, L.L.C. ("Gatlinburg") has withheld its consent to the AGC's submission of an *amicus curiae* brief.

The AGC is a nonprofit trade association representing and serving the interests of general contractors and other firms asso-

ciated with the construction industry, including specialty contractors, material suppliers and service providers. With 103 state and local chapters, at least one in each state and one in Puerto Rico, the AGC has approximately 7,500 regular members and 26,500 associate members. The AGC's regular members include general construction contractors engaged in many different categories of construction, including multi-family housing projects, office buildings, warehouses, shopping centers, telecommunication centers, highways, bridges, tunnels, airports, dams, water works and waste water treatment facilities, power generation facilities, and defense facilities. The AGC's associate members supply the nation's builders with, among other things, materials, labor, insurance and surety products, and professional services.

For nearly nine decades, the AGC has developed or collaborated in the development of industry standard form construction contracts. Among the goals of these documents is to promote efficient transactions and economical construction through equitable assignment of risk and responsibilities among construction project participants. The AGC produces standard form contracts for the various project delivery systems and for the many multi-tiered relationships that exist on each project: owner/contractor, contractor/subcontractor, owner/construction manager, and owner/design-builder to name a few. These and other industry-prepared documents, such as those published by the professional associations for architects and engineers, are widely used throughout the country as baseline agreements for construction projects. These documents also set forth currently accepted industry practices and customs.

By employing industry standard form contracts containing widely accepted terms and conditions, the parties to a construction project bring a greater measure of predictability, stability and consistency to their transactions. Standard form contracts, and the knowledge that consistently used language is consis-

tently understood and applied, improve the construction process.

The AGC standard form construction contracts seek not only dispute avoidance through a fair allocation of risk and responsibility but cost-effective, expedient dispute resolution through the inclusion of broad arbitration provisions. Written in plain language, they include within their scopes all matters that might bear upon the contracts, providing the parties with the certainty of knowledge that their disputes will be addressed in the manner that they chose in their contract. This is the same goal promoted by the Federal Arbitration Act ("FAA"), which mandates that agreements to arbitrate in contracts involving interstate commerce "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2.

The agreement at issue in this case is AGC Document No. 500—Standard Form of Agreement Between Owner and Construction Manager (Guaranteed Maximum Price Option) (1980). The agreement contained both a broad arbitration provision and a generic choice of law provision.

The decision of the Supreme Court of Tennessee thwarts the national policy in favor of the arbitration of disputes promoted by the Federal Arbitration Act, contradicts the clear precedent of this Court in interpreting the FAA, and ignores the plain language of the arbitration agreement in the AGC standard form construction management contract at issue. The AGC supports Petitioner Frizzell's Petition for a Writ of Certiorari because the Tennessee court's decision, if unchallenged, will serve as the basis for others to defeat the proper application of broad arbitration agreements and the goal of the FAA. Without consistent application, the providers, purchasers and users of construction services, as well as all those who rely upon arbitration provisions in contracts involving interstate commerce, will be harmed.

As both a supporter and publisher of standard form construction contracts that contain arbitration agreements and that are used every day throughout the country, the AGC is interested in ensuring that the terms and conditions of such documents are consistently interpreted by courts throughout the nation in conformance with established precedents. The conflict between the decision of the Supreme Court of Tennessee and the decisions of this Court must be addressed. The AGC thus seeks leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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Petitioner,

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GATLINBURG, L.L.C.,
Respondent.

BRIEF OF AMICUS CURIAE THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

The Associated General Contractors of America, Inc. ("AGC") submits this brief as *amicus curiae* urging this Court to grant the Petition for Writ of Certiorari of Petitioner Frizzell Construction Company, Inc. ("Frizzell").[1]

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[1] Pursuant to Rule 37.6, AGC hereby states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than AGC, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. (AGC) is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry, including specialty contractors, material suppliers and service providers. The AGC has 103 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico.

The AGC has approximately 7,500 regular members and 26,500 associate members. The AGC's regular members are general construction contractors engaged in many different categories of construction, including multi-family housing projects, office buildings, warehouses, shopping centers, telecommunication centers, highways, bridges, tunnels, airports, dams, water works and waste water treatment facilities, power generation facilities, and defense facilities. The AGC's associate members supply the nation's builders with, among other things, materials, labor, insurance and surety products, and professional services.

From its inception, the AGC has sought to answer the nation's and the construction industry's needs for services and information, to demonstrate the value of construction contractors, to increase the industry's dedication to skill, integrity and responsibility, and to improve and enhance the conditions under which its members conduct their affairs. The AGC, in fact, was founded at the request of President Woodrow Wilson, who discerned the importance of the construction industry for the expeditious construction of housing and training facilities for U.S. military forces during World War I.[2] Today, the construction

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[2] Mooney, B., *Builders for Progress: The Story of the Associated General Contractors of America*, (McGraw-Hill, Inc., 1965), p.1.

industry constitutes one of the largest sectors of our national economy; its health and stability are vital to our national interests and future prosperity.

As a service to the industry, and to promote efficient transactions and economical construction for the common good, the AGC has since the 1920s undertaken or collaborated in the development, distribution, and sale of standard form construction contracts that equitably divide risks and responsibilities among construction project participants. The AGC produces standard form contracts for the various project delivery systems and for the many multi-tiered relationships that exist on each project. These and other industry-prepared documents, such as those published by the professional associations for architects and engineers, are widely used throughout the country as baseline agreements for construction projects. These documents also provide examples of appropriate risk allocation and are sources of currently accepted industry practices and customs. They lend predictability, stability and consistency to the industry's business and legal transactions, thereby speeding transactions and saving associated costs. Industry-prepared standard form contracts provide a needed degree of familiarity and normalcy to frequently high-risk, low-profit endeavors.

Construction often is a contentious business due to the multitude of parties and the unique risks involved in each project, and disputes are an all too familiar part of the construction landscape. To address disputes, most industry standard form construction contracts and many custom construction contracts contain dispute resolution provisions that provide for arbitration as a crucial part of their overall risk allocation structure. The industry perceives arbitration and other alternatives to litigation as preferable, since they yield decisions by subject matter experts that are faster, less expensive and less contentious, avoiding the complex and drawn-out procedural labyrinth attendant in court adjudication of disputes. In short, the industry recog-

nizes that protracted litigation sounds the death knell for many contractors' businesses.

Like many others, the AGC has sought to minimize the impact of construction disputes. To that end, the AGC has included arbitration provisions in its standard form construction contracts, which owners and contractors use every year to build thousands of projects throughout the United States. Such arbitration provisions are broadly written in plain language to include within their scopes all matters that might bear upon the contracts. They provide the parties with the certainty of knowledge that their disputes will be addressed in the manner that they chose in their contract.

The AGC is concerned that the decision of the Tennessee Supreme Court in *Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (1999), ignores the plain language of the arbitration agreement in the AGC standard form construction management contract, which establishes that "[a]ll claims, disputes or other matters in questions arising out of, or relating to, this Agreement * * * shall be decided by arbitration" and that "[t]his Agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law." As the Tennessee Supreme Court concedes in its decision, the construction management contract clearly involved interstate commerce, rendering it subject to the Federal Arbitration Act, as the "prevailing arbitration law." Ignoring the plain language of the arbitration agreement frustrates the AGC's purpose of providing the construction industry with standard form contracts that are easily understood and applied.

The most troubling ramification of this decision, however, is that it flouts established federal case precedent and the strong federal policy in favor of the enforceability of arbitration agreements. To allow this decision to stand invites other state courts to carve out random exceptions to the uniform applica-

tion of the Federal Arbitration Act, thereby frustrating the Act's underlying purposes. Parties entering into contracts that involve interstate commerce no longer will rest assured that an essential element of their bargain, the agreement to arbitrate, will be given effect.

The AGC has appeared as amicus curiae in several of this Court's recent cases, including *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S.Ct. 1754 (1996); *NLRB v. Town & County Electric, Inc.*, 516 U.S. 85, 116 S.Ct. 450 (1995); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 113 S.Ct. 1190 (1993).

SUMMARY OF ARGUMENT

The opinion of the Supreme Court of Tennessee is contrary to the clear precedent established by this Court upholding the arbitrability of contract claims, including claims for fraudulent inducement of a contract, pursuant to the Federal Arbitration Act ("FAA"). The national policy established by the FAA guarantees that agreements to arbitrate claims arising out of contracts involving interstate commerce "shall be valid, irrevocable, and enforceable." This Court has interpreted the FAA to uphold arbitration even if a rule of state law would otherwise exclude a claim from arbitration. For those involved in the construction industry and for those using standard form construction contracts, the FAA and this Court's precedent interpreting it, foster predictability and consistency in the business and legal transactions that occur everyday in the construction industry.

The Tennessee Supreme Court's decision thwarts this Court's precedent and frustrates the interests of those who seek predictability, stability and consistency in commercial transactions. The Tennessee Supreme Court not only ignored the clear precedents of this Court, it also ignored the persuasive authority of the United States Court of Appeals for the Sixth Circuit. If

unchallenged, the opinion of the Tennessee Supreme Court will cast a pall upon the legal and business environment in which members of the construction industry and all others involved in interstate commerce operate. Without the predictability afforded by the FAA and this Court's interpretation of the FAA, the enforceability of agreements to arbitrate contained in the countless standard from contracts in use today will vary from forum to forum. As a result, those who look to arbitration as a viable, expeditious and less expensive alternative to litigation will not know whether their agreement to arbitrate will be enforceable or illusory.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE TENNESSEE SUPREME COURT THWARTS THE GOAL OF THE FAA AND FRUSTRATES THE OBJECTIVES OF THE AGC AND ITS MEMBERS.

The Federal Arbitration Act has as its goal the promotion of arbitration of claims that arise under contracts involving interstate commerce. The FAA, 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This policy is founded on the mandate that agreements to arbitrate in such contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The value of arbitration as compared to litigation, is hardly questioned. As this Court has noted, "liti-

gation is costly and time-consuming, and * * * judges are less adapted to the nuances of the disputes that typically arise" in particular transactions than are those people chosen as arbitrators because of their unique expertise. *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 747 (1981) (Burger, C.J., and Rehnquist, J., dissenting).

In contrast, arbitration can provide a "swift, fair, and inexpensive remedy." *Id.* at 748. One of the key advantages of arbitration is that it allows the parties to the agreement to select arbitrators who are experienced in the area that is the source of the dispute. In the case of construction disputes, arbitrators are often drawn from the ranks of contractors, architects, engineers, construction managers and construction attorneys. The familiarity of these individuals with the construction process enables them to more quickly grasp technical complexities and industry practices than would a judge or jury.

The AGC shares with the FAA the goal of promoting arbitration as an alternative to litigation. Only one year after the FAA was enacted in 1925, the AGC board of directors passed a resolution endorsing the principle of arbitration and further recommending that agreements to arbitrate be included in construction contracts. (*See,* J. Lail, *Replacing Confrontation With Cooperation,* 1995 Wiley Construction Law Update, Ch. 1). Arbitration, and alternative dispute resolution in general, are a means of reducing the high level of risk attendant to the construction process. The complex nature of a construction project and the variety of participants who must coordinate their efforts and responsibilities provide fertile ground for disputes. Disputes are a well known but unwelcome element of the construction process, costing the parties to the construction project time and money and the commitment of resources that could be devoted to other business opportunities.

The AGC standard form contract documents promote arbitration, and other forms of alternative dispute resolution, as a means of addressing disputes in a timely and cost-effective manner. The agreement between Petitioner Frizzell and Respondent Gatlinburg was AGC Document No. 500—Standard Form of Agreement Between Owner and Construction Manager (Guaranteed Maximum Price Option) (1980). This standard form document contained a broad arbitration provision, which provided in pertinent part:

> All claims, disputes and other matters in questions arising out or, or relating to, this Agreement or the breach thereof, * * * shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties agree otherwise. This Agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

Petitioner's App. 2a, 15a.

Petitioner Frizzell and Respondent Gatlinburg adopted the AGC standard form contract and the agreement to arbitrate contained therein as the complete expression of their bargain. The agreement to arbitrate was broadly written to include within its scope all manner of dispute that might arise from the contract. Through such arbitration provisions, the AGC standard form contract documents provide a means of addressing disputes through a subject matter expert chosen by the parties, without the expense, delay and procedural complexity involved in litigation.

The AGC standard form construction contracts, as well as those published by other industry organizations such as those for architect and engineers, seek to bring uniformity and pre-

dictability to the business and legal transactions attending the construction process.

The decision of the Tennessee Supreme Court effectively thwarts this objective by ignoring the plain language of the standard form arbitration provision and in reading the choice of law provision to incorporate state law precluding the arbitration of claims of fraudulent inducement. The generic choice of law provision contained in the construction management agreement between Petitioner Frizzell and Respondent Gatlinburg ("This Agreement shall be governed by the law of the place where the Project is located" *See Frizzell,* 9 S.W.3d at 79; Petitioner's App. 2a & n.1.), does not demonstrate an intent of the parties to incorporate Tennessee law contrary to the FAA.

The Tennessee Supreme Court's reading of the arbitration and choice of laws provisions undermines the predictability and consistency of transactions that is the goal of the standard form contract document and the AGC. As will be discussed further herein, the Tennessee court's reading of the agreement contradicts the precedents of this Court. To the extent prior decisions of this Court have generated confusion over the correct application of the FAA and arbitration and choice of law provisions in state court actions, this Court should take the opportunity to dispel such confusion and grant certiorari.

Left unchallenged, the ruling of the Tennessee Supreme Court will serve as a basis for other state courts to undermine the national policy of the FAA by broadly applying generic choice of law provisions to preclude the arbitration of disputes arising from agreements otherwise subject to the FAA. Parties to agreements containing broad arbitration provisions will not know the certainty of an essential element of their bargain, the method by which they chose to address disputes. Instead, the enforceability of agreements to arbitrate otherwise governed by the FAA will be subject to forum shopping and the willingness

of parties to employ the gambit of claiming fraudulent inducement as a means of avoiding arbitration. The result will be to increase legal costs, fill crowded court dockets and to delay further the resolution of commercial disputes. These are precisely the perils identified by the Sixth Circuit in its decision in *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998).

Certiorari should be granted so that this Court may confirm the proper application of the FAA to standard contractual arbitration provisions in contracts implicating interstate commerce. A clarification of this issue will not only benefit Petitioner Frizzell, the AGC and its members, and other participants in the construction industry, but all those who employ arbitration as a means of resolving commercial disputes. This Court should grant certiorari to ensure that such disparity of results, contrary to the goal of the FAA, do not continue to occur and that arbitration agreements subject to the FAA are enforced consistently and in accordance with this Court's precedent.

II. THE RULING OF THE TENNESSEE SUPREME COURT CONFLICTS WITH THE PRECEDENTS OF THIS COURT.

This Court has held that a contractual choice of law provision incorporating state law, in a contract otherwise subject to the FAA, will not displace the FAA's directive that arbitration provisions are enforceable, even where state law precludes arbitration of a claim. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The Tennessee Supreme Court ignored this precedent, holding that the incorporation of Tennessee law operated to preclude the arbitration of a claim for fraudulent inducement of contract. That the Tennessee Supreme Court has chosen to ignore the clear precedent of this Court provides grounds for certiorari. *See* S. Ct. Rule 10(c).

The FAA enunciates a national policy of promoting arbitration of claims that arise under contracts involving interstate commerce. This policy is founded on the mandate that agreements to arbitrate in such contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court established as a matter of substantive federal law, that "a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud", "even in the face of a contrary state rule." *Id.* at 400, 402. Absent a claim that the arbitration clause itself was induced by fraud, the arbitration provision was broad enough to encompass a claim of fraudulent inducement. *Id.*

In *Mastrobuono v. Shearson Lehman Hutton, Inc., supra,* this Court enunciated the rule that a generic choice of law provision is not evidence that the parties intend to incorporate state law that conflicts with federal arbitration rules. Together, *Prima Paint* and *Mastrobuono*, answer the question addressed by the Tennessee Supreme Court. The generic choice of law provision contained in the construction management agreement between Petitioner Frizzell and Respondent Gatlinburg does not demonstrate an intent of the parties to incorporate Tennessee law contrary to the FAA. As such, the choice of law provision does not render unenforceable the broad arbitration provision contained in the same construction management agreement, as applied to a question of fraudulent inducement of contract.

As discussed in greater detail in the Petition for Writ of Certiorari of Petitioner Frizzell, the Tennessee Supreme Court clearly ignored the precedent of this Court, most specifically this Court's holding in *Mastrobuono.* While acknowledging the applicability of the FAA to the Agreement in question and accepting the basic principle of *Prima Paint* that claims of fraudulent inducement will be subject to arbitration, the Tennessee Supreme Court nonetheless parts company with this Court

on the effect of the choice of law provision. This Court in *Mastrobuono* sought to harmonize a broad arbitration provision with a choice of law provision, so as to give both proper effect. In *Mastrobuono*, the respondent argued that the choice of law provision evidenced the parties' intent to incorporate New York law that, under a decision of the New York Court of Appeals, precluded arbitrators from awarding punitive damages. The Court rejected this argument. The generic choice of law provision at issue was not an unequivocal exclusion of punitive damages claims from arbitration under New York law, and therefore did not operate to limit the scope of the arbitration provision. This Court properly understood the generic choice of law provision as a substitute for the conflict of law analysis that otherwise would determine what law to apply to disputes arising out of contractual relationships. As such, the choice of law provision was not intended to inhibit the enforceability of the arbitration provision. Rather, this Court stated:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.

514 U.S. at 63-64.

Faced with the very same issue presented here, the Sixth Circuit, the federal circuit in which Tennessee is located, expressly invoked *Mastrobuono* in harmonizing a "conspicuously broad" arbitration provision with a generic choice of law provision incorporating Ohio law. *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926 (6th Cir. 1998). Ruling that the choice of

law provision was not an unequivocal inclusion of Ohio law precluding arbitration of the claim of fraudulent inducement, the Sixth Circuit found resonance for its decision not only in the decisions of other circuits "but also in policy and common sense." *Id.* at 937-938. This conflict between the ruling of the Sixth Circuit in *Ferro* and the Supreme Court of Tennessee is but one more basis for this Court to grant certiorari. *See* S. Ct. Rule 10(b).

In contrast, the Tennessee Supreme Court finds that the generic choice of law provision at issue herein applies to decide what claims are even subject to arbitration. Thus, the state court retained jurisdiction over the question of whether the contract was fraudulently induced. The Tennessee Supreme Court can find no support for its decision in this Court's holding in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). Arguably, the *Volt* decision was overruled by this Court's later ruling in *Mastrobuono*. Further, contrary to being an exception to the applicability of the FAA, *Volt*, at best, stands for the proposition that a choice of law provision incorporating state procedural rules of arbitration will be upheld where those rules are designed to encourage the resort to arbitration, consistent with the national policy of the FAA. More precisely, *Volt* concerned a state rule determining "the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 688 (1996).

The failure of the Tennessee Supreme Court to acknowledge the precedents of *Mastrobuono* and *Ferro* supports the granting of certiorari in this matter. *See* S. Ct. Rule 10(b), (c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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